IDEAS ON LIBERTY

- A Constitutional Counterrevolution
- A Man's Home Once Was His Castle
- Mencken on Gun Control
- P. T. Bauer's Market-Liberal Vision

OCTOBER 2000

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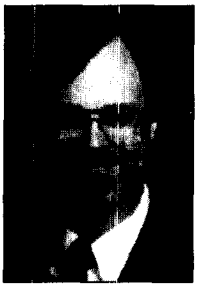

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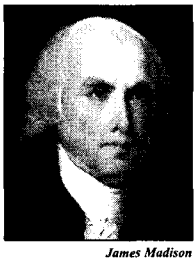

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PERSPECTIVE

Imperfect Opponents

"Microsoft and the government were the perfect opponents. The government has some power, but Microsoft has at least as much. Anyone else facing either one of them would be overmatched."

That is not some comedian's line. It was spoken in all seriousness, I presume, by David Boies, who led the Justice Department's antitrust case against Microsoft. If you don't believe me, you can look it up in the June 9 *New York Times*.

Mr. Boies's self-serving remark sets off a flurry of thoughts. But the essential comment comes from Steven Yates, who writes for this magazine. When I e-mailed him the quotation, he quickly wrote back, "Has anyone pointed out that while the federal government has the power to break up Microsoft, Microsoft does not have the authority to break up the federal government?"

The other side of that question is that the federal government has achieved its monopoly through the use of force, while Microsoft has achieved its dominant position—it is not a monopoly—through voluntary exchange. We may infer much from these two methods of dealing with people.

Microsoft must have offered all the people who bought its products the best alternative in the marketplace. It doesn't matter that for some techies Windows doesn't measure up to an operating system ideal. It lets regular people get their work and play done more easily and economically—in their estimation—than anything else they could have bought. If something else comes along that is so much better that it justifies a switch, they'll switch.

It's a peaceful process, where people have to offer one another benefits before they deal. No one can force someone else to buy or sell what he does not wish to buy or sell.

Now let's look at the government, which Mr. Boies says has no more power—and perhaps less; re-read the quotation—than Microsoft. If you don't do what the government says, it has the legal authority to compel you. It doesn't treat you like a sovereign consumer. It treats you like a subject. It can take

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your property. It can take your liberty. If you resist, it can take your life.

The last I checked, it was Bill Clinton, not Bill Gates, who ran such an organization.

* * *

The War on Drugs is touted as necessary to defend the health of the nation. But if you think the health of the nation requires the police to break into homes, trashing them and sometimes killing the inhabitants, then, as Ayn Rand might have said, check your premises. Paul Armentano has the gruesome details.

Many people have written that all gun-control laws have an intrinsic loophole: they exempt violent lawbreakers while snagging the law-abiding. But no one has managed to say it as well as H.L. Mencken did in 1925.

What would you call an organization that uses a variety of methods to systematically deceive people about what it does to them and makes it nearly impossible for them to object if they learn the truth? Charlotte Twight calls it "government."

When the name Peter Bauer comes to mind, the words "hero" and "courage" should be close behind. He demolished almost single-handedly the once-reigning socialist development economics and showed that markets are the only chance for the undeveloped world. James Dorn summarizes Bauer's remarkable work.

On a related subject, there's a tendency in some quarters to think of capitalism as a system suitable to Anglo-Americans and unsuitable to everyone else. That's suicidal thinking, writes Christopher Lingle.

To understand the government's antitrust case against Microsoft, you have to understand the philosophy and philosopher behind it. Barbara Hunter introduces us to Lawrence Lessig.

What's the difference between a for-profit and nonprofit health facility? A great deal of pain and humiliation. Tom Palmer explains.

The Supreme Court ruled that women cannot sue their alleged rapists in federal court. Is this the end of something decent or the beginning? Wendy McElroy sorts it out.

According to the government, cartels are bad—except when governments get together to stamp out tax havens. David Laband has noticed the ominous collusion.

The growth of high-tech industries has brought a rash of patent-infringement suits, and more are in the offing. Christopher Mayer says it's a good time to reconsider the patent laws and see them for what they really are.

If the government can't quarter troops on your property, why can it quarter animals there? Andrew Morriss and Richard Stroup turn the "living Constitution" doctrine against its proponents.

This month our columnists ruminate thusly: Donald Boudreaux shows why he admires Thomas Babington Macaulay. Lawrence Reed indicts government deposit insurance. Doug Bandow wants to end U.N. "peacekeeping." Dwight Lee says it's okay to put a price on human life. Mark Skousen drives a stake through the heart of taxes on capital. Walter Williams says greed is good. And Randall Holcombe, hearing it said incessantly that the estate tax is fair, protests, "It Just Ain't So!"

Our reviewers render their verdicts on books about the Internal Revenue Service, the Nazi anti-cancer program, freedom of contract, welfare-state "liberalism," the future of money, and air pollution.

—SHELDON RICHMAN

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Thoughts on Freedom

by Donald J. Boudreaux

Thomas Babington Macaulay

Karol and I named our son Thomas Macaulay Boudreaux in honor of some truly inspiring classical liberals. Two of these are our dear friends Hugh and Pinky Macaulay. Hugh taught economics at Clemson University from the late 1940s until 1983 and was instrumental in shaping that school's economics department into one of the finest in the nation.

The other inspiration for Thomas's name is the great English historian, essayist, and poet Thomas Babington Macaulay (1800–1859). October 25th of this year is the bicentennial of his birth. It is a date that all friends of liberty, prosperity, and progress should celebrate. Macaulay was truly one of the greatest champions of liberty ever to breathe.

While his most famous work is his massive *History of England*, I reproduce below some of the key passages from a far shorter and less famous—but no less impressive—product of his pen: Macaulay's 1830 essay "Southey's Colloquies on Society." Reading this essay is a lavish intellectual experience. It comes closer to perfection than perhaps any essay I've ever read.

Robert Southey was Britain's poet laureate, who as a young man was a radical Jacobin and who as an older man became a conservative of the most wicked sort. Southey loathed commerce and capitalism. He longed for the pre-industrial age in which peasants worked the land and lived in cottages—an age not marred by factories, an extensive division of labor, and the audacity of ordinary people choosing their own paths in life rather than submitting to the authority of political elites.

The brilliance of Macaulay's dissection of Southey's political and economic musings takes the breath away! As you read the following selections from Macaulay's essay, note two of its features. The first is the characteristic clarity and directness of his style. The second is the appropriateness of Macaulay's 170-year-old themes to the policy debates currently raging in America.

Southey's Colloquies on Society *by Thomas Babington Macaulay*

As to the effect of the manufacturing system on the bodily health, we must beg leave to estimate it by a standard far too low and vulgar for a mind so imaginative as that of Mr. Southey, the proportion of births and deaths. We know that, during the growth of this atrocious system, this new misery, to use the phrases of Mr. Southey . . . there has been a great diminution of mortality, and that this diminution has been greater in the manufacturing towns than anywhere else. . . .

He confesses that he is not versed in political economy, and that he has neither liking nor aptitude for it; and he then proceeds to read the public a lecture concerning it which fully bears out his confession. . . .

Donald Boudreaux is president of FEE.

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He conceives that the business of the magistrate is not merely to see that the persons and property of the people are secure from attack, but that he ought to be a jack-of-all-trades, architect, engineer, schoolmaster, merchant, theologian, a Lady Bountiful in every parish, a Paul Pry in every house, spying, eavesdropping, relieving, admonishing, spending our money for us. His principle is, if we understand it rightly, that no man can do anything so well for himself as his rulers, be they who they may, can do it for him, and that a government approaches nearer and nearer to perfection in proportion as it interferes more and more with the habits and notions of individuals. . . .

The maxim, that governments ought to train the people in the way in which they should go, sounds well. But is there any reason for believing that a government is more likely to lead the people in the right way than the people to fall into the right way of themselves? . . . .

But we see no reason for thinking that the opinions of the magistrate on speculative questions are more likely to be right than those of any other man. None of the modes by which a magistrate is appointed, popular election, the accident of the lot, or the accident of birth, affords, as far as we can perceive, much security for his being wiser than any of his neighbors. The chance of his being wiser than all his neighbors together is still smaller. . . .

Government, as government, can bring nothing but the influence of hopes and fears to support its doctrines. It carries on controversy, not with reasons, but with threats and bribes. If it employs reasons, it does so, not in virtue of any powers which belong to it as a government. Thus, instead of a contest between argument and argument, we have a contest between argument and force. . . .

Nothing is so galling to a people not broken in from birth as a paternal, or, in other words, a meddling government, a government which tells them what to read, and say, and eat, and drink and wear. . . .

It is indeed a matter about which scarcely any doubt can exist in the most perverse mind that the improvements of machinery have lowered the price of manufactured articles, and have brought within the reach of the poorest some conveniences which Sir Thomas More or his master could not have obtained at any price. . . .

But in the old world we must confess ourselves unable to find any satisfactory record of any great nation, past or present, in which the working classes have been in a more comfortable situation than in England during the last thirty-years. When this island was thinly populated, it was barbarous; there was little capital; and that little was insecure. It is now the richest and most highly civilized spot in the world; but the population is dense. . . .

It is not by the intermeddling of Mr. Southey's idol, the omniscient and omnipotent State, but by the prudence and energy of the people, that England has hitherto been carried forward in civilization; and it is to the same prudence and the same energy that we now look with comfort and good hope. Our rulers will best promote the improvement of the nation by strictly confining themselves to their own legitimate duties, by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment, by maintaining peace, by defending property, by diminishing the price of law, and by observing strict economy in every department of the state. Let the Government do this: the People will assuredly do the rest. □

So true. Happy 200th birthday, Mr. Macaulay!

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The Death Tax Is Fair?

It Just Ain't So!

When George McGovern was running for president in 1972, he gave a talk to a group of auto workers in which he advocated increasing the estate tax, and his audience reacted by booing his position. McGovern was baffled by the audience reaction, and after his talk, commented to his own advisers, "It's not like they are going to inherit anything." What McGovern found out was that even people of modest means still perceive the unfairness of the estate tax. Once you have earned something, it should be yours, and it is unfair for the government to confiscate it when you die. A more subtle lesson is that when people evaluate political proposals, they don't always just ask, "what's in it for me?" Sometimes they prefer policies that seem fair, even if those policies do not benefit them directly.

Paul Krugman raised these same issues in an essay titled "Death and Taxes," *New York Times,* June 14. He analyzes the House of Representatives vote to repeal the inheritance tax by considering who gains and who loses, and concludes that the vote was a simple matter of special-interest legislation favoring a small minority of rich people at the expense of everybody else. If people knew the truth, he asserts, the legislation would face a much rougher ride. But Krugman's argument is suspect on two grounds. First is his analysis of the facts about the inheritance tax. Second, and probably more significant, is his implication that people support legislation only when it benefits them.

Effects of the Inheritance Tax

Krugman correctly notes that a large share of total private wealth in the United States is held by a small percentage of the population. If people knew how skewed the distribution of wealth really is, Krugman asserts, support for the repeal of the estate tax would plummet. The current estate tax hits only about 2 percent of all estates, so Krugman says it is levied almost entirely on the very rich. The raw numbers do not tell the entire story. One reason the tax is levied on so few estates is that there are ways, both legal and illegal, to avoid it. The 2 percent number is artificially lower than it otherwise would be because the estate tax causes people to minimize their taxable estates. Many more people are directly affected by the tax.

Another problem with repealing the estate tax, Krugman says, is the revenue loss to the Treasury. However, reputable academic studies calculate that the estate tax may actually be a net drain on the Treasury, because people engage in activities to avoid the tax when they are alive, and this legal tax avoidance (such as setting up foundations into which one can transfer assets) lowers federal income tax revenues by more than the estate tax collects. On net, the estate tax raises very little revenue for the Treasury, and may raise no net revenue when all its effects are considered. It is a tax that provides little benefit to anybody, but costs a few people a significant amount—and not just money. Krugman notes that cases where the estate tax forces heirs to sell the family farm or liquidate the family business to pay the tax are rare, but then again, so are cancer deaths from secondhand smoke, and the federal government works hard to prevent those rare tragedies.

Krugman likes the estate tax because it helps level the playing field, but it does so in the worst possible way. It hurts those at the upper end of the wealth distribution, but provides no significant benefit to those at the lower end. It follows the easy route in leveling the playing field because it is always easier to hurt the rich than it is to help the poor.

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Despite the basic statistics Krugman presents, a broader analysis of the proposed repeal shows that it is a very desirable move. It helps some, hurts nobody, and it would enhance the efficiency of the economy. If people really understand the issues, and if they consider only their own narrow self-interest, repeal of the tax should be widely supported. The only people who could reasonably mount an opposition to the tax are people who do not really understand the policy's effects, or those who are so envious of rich people that they are willing to hurt everyone a little in order to hurt America's wealthiest citizens a lot.

Fairness

I believe that Krugman has painted an overly simplistic picture of the facts, but for sake of argument let's say that Krugman is right: repealing the estate tax would benefit a small fraction of the population, and the wealthiest fraction at that. Analyzing the estate tax the way Krugman does implies that people favor public-policy changes only when those changes bring them direct tangible benefits. Do people really decide whether they favor a specific piece of legislation based simply on whether it provides direct benefits to them?

Americans in general, whether they are auto workers or Silicon Valley entrepreneurs, believe that when people earn their income honestly, that income becomes their property. It does not belong to other people, or to the general public, or to the government. The money people pay in taxes is their money, and if they get a tax cut, it is not a benefit to them, as Krugman suggests; it is just less of a cost. Letting people keep more of the money they earn is a good thing. Of course most tax cuts go to the people with the highest income and the most wealth, because those are the people who pay most of the taxes.

Krugman is right that in most cases paying the estate tax does not cause heirs to have to sell the family farm or business, but so what? Is it any less unfair that the people who invested in stocks and bonds, financing the growth of the American economy, rather than buying boats, expensive cars, and lavish vacations, must turn over so much of their estate to the government when they die? Those people already paid income taxes on the money when they originally earned it, and it shouldn't be taxed again when the people who paid taxes on it the first time die. The family farm or small business cases simply help illustrate the point.

I have argued that once the facts are understood, repealing the estate tax will be seen to benefit everyone, not just the rich. But even if Krugman is right and the benefit will only go to a small fraction of America's richest citizens, the tax is still unfair. People sense that unfairness, and that is the real reason there is not more opposition to its repeal. Opposition is weak not because people hope to benefit directly from the tax, but because people believe that once wealth is fairly earned, it is the property of the owner, and they oppose government confiscation. □

—Randall G. Holcombe
DeVoe Moore Professor of Economics
Florida State University

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A Man's Home Once Was His Castle

by Paul Armentano

Few photos have inspired as many words as that of a young Cuban boy face to face with a MP-5 machine gun. The Associated Press photo of federal armed agents seizing Elián González from his Miami relatives aroused outrage among many Americans and—perhaps ironically—several congressional conservatives. And while the photograph was unique, the act it captured was hardly unusual. Raids similar to the one on the González family home occur many times a day in the name of the War on Drugs, often with far more tragic results.

Take the case of Scott Bryant. Thirteen Wisconsin sheriff's deputies burst into the 29-year-old's trailer on the night of April 17, 1995, executing a no-knock warrant. Bryant, who was unarmed, was shot and killed during the assault while his 7-year-old son looked on.[1] Police seized less than three grams of marijuana. On review, the county district attorney found that the shooting was "not in any way justified."[2]

Robert Lee Peters had just settled down to watch a movie with his family when St. Petersburg police officers smashed through his front door unannounced with a battering ram in July 1994. Fearing that his home was being burglarized, Peters grabbed a gun and fired at his attackers. The officers returned fire, killing the 33-year-old father of two. Police confiscated two pounds of marijuana.[3]

Sometimes victims possess no drugs at all. Just ask the family of Annie Rae Dixon, an 84-year-old grandmother shot and killed during a 2 a.m. drug raid of her east Texas home in 1992. No drugs were ever found on the premises. One officer later hypothesized that his pistol accidentally discharged when he kicked open Dixon's bedroom door. "[I] started throwing my guts up crying because I knew I had shot somebody that didn't have no reason to be shot," he said.[4] No less vicious was the 1998 shooting death of Pedro Oregon Navarro by Houston police. Six officers stormed his home at 1:40 a.m. in a military-style raid after a man arrested for public drunkenness said Navarro was a drug dealer. Agents shot the bleary-eyed Navarro 12 times, killing him. A search of his residence produced no illicit drugs or weapons.[5]

California rancher Donald Scott, 61, met a similar fate in 1992, when a team of local and federal agents burst into his mansion during a midnight raid, ostensibly to search for marijuana. When Scott reached for a pistol to defend himself, he was shot dead. An investigation by the Ventura County district attorney later revealed that the Los Angeles County Sheriff's Department had fabricated evidence that Scott was cultivating pot because it hoped to seize his property, which was adjacent to a federal park.[6] Ventura County officials eventually agreed to pay the Scott family $4 million in damages; the federal government agreed to pay $1 million.[7]

Paul Armentano is a senior policy analyst at the NORML Foundation in Washington, D.C.

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More recently, a SWAT team from El Monte, California, raided a home in neighboring Compton on the evening of August 9, 1999, killing retired grandfather Mario Paz by shooting him twice in the back. Police executing the search warrant said they believed the house was sometimes used as a mail drop by a local drug dealer.[8] Although police found no drugs and filed no charges against any of the surviving family members, they refused to return an estimated $11,000 dollars seized during the deadly raid.[9]

Some victims are the victims of sheer error. Take the September 29, 1999, assault by Denver SWAT agents on the home of Ismael Mena. Mena, a 45-year-old father of nine, was shot eight times and killed by police in the unannounced raid. No drugs were found, and police now speculate that they may have had an incorrect address.[10]

An equally vicious police blunder claimed the life of Reverend Accelyne Williams, a 75-year-old retired Methodist minister who suffered a fatal heart attack when Boston police broke into his apartment on March 24, 1994. Acting on false information provided by a confidential informant, anti-drug agents chased Williams to his bedroom, shoved him to the floor, and pointed guns at his head—inducing the heart attack that killed him. Boston Police Commissioner Paul Evans later admitted at a press conference that police likely raided the wrong apartment. "If that is the case, then there will be an apology," he said.[11] Two years later, the city paid a $1 million settlement to Williams's widow.[12]

William Pitt expressed the importance Americans once placed on the sanctity of the home from trespass when he said: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

The fact that our government and law-enforcement personnel now view the sovereignty of the home as a quaint anachronism should disturb us all. In this regard, the photo of a terrified Elián González is a legitimate cause for congressional concern. However, rather than use this opportunity to attack the Clinton administration's handling of one, highly politicized case, Congress should address the broader issue of whether the escalating enforcement of drug prohibition threatens the right of all of us to be secure in our homes. To the families of the victims named above, the answer is all too clear. □

1. Mikki Norris, Chris Conrad, and Virginia Resner, *Shattered Lives: Portraits from America's Drug War* (El Cerrito, Calif.: Creative Xpressions, 1998), p. 66.
2. David Kopel and Paul Blackman, "Death By Bounty Hunter," Independence Institute Feature Syndicate, September 5, 1997; http://i2i.org/SuptDocs/OpEdArcv/op970906.htm.
3. Norris, et al., p. 62; also see the Web site "Human Rights and the Drug War": http://www.hr95.org.
4. Ibid.
5. "Tyranny and the War on Drugs," *Investor's Business Daily*, September 21, 1999. The article is posted at http://www.mapinc.org/drugnews/v99/n1034/a08.html.
6. Ari Armstrong and Dave Kopel, "The Drug War Kills Innocent People," *Denver Post*, December 30, 1999; http://www.mapinc.org/drugnews/v00/n002/a09.html.
7. "Family of Man Slain in Raid Rewarded," Associated Press, January 12, 2000.
8. "Tyranny and the War on Drugs."
9. Anne-Marie O'Conner, "Family of Police Shooting Victim Still Out $11,000," *Los Angeles Times*, September 23, 1999; http://www.mapinc.org/drugnews/v99/n1040/a07.html.
10. Armstrong and Kopel.
11. "Botched Raids and Collateral Casualties in the Drug War," Common Sense for Drug Policy, http://www.drugsense.org/jnr/botched.htm.
12. Ric Zahn, Zachary Dowdy, "Iron Fist of Police Swat Team Use Questioned," *Boston Globe*, May 11, 1998; http://www.mapinc.org/drugnews/v98/n342/a03.html.

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The Uplifters Try It Again

by H. L. Mencken

I

The eminent *Nation* announces with relish "the organization of a national committee of 100 to induce Congress to prohibit the inter-State traffic in revolvers," and offers the pious judgement that it is "a step forward." "Crime statistics," it appears, "show that 90% of the murders that take place are committed by the use of the pistol, and every year there are hundreds of cases of accidental homicide because someone did not know that his revolver was loaded." The new law—or is it to be a constitutional amendment?—will do away with all that. "It will not be easy," of course, "to draw a law that will permit exceptions for public officers and bank guards"—to say nothing of Prohibition agents and other such legalized murderers. "But soon even these officials may get on without revolvers."

More than once, in this place, I have lavished high praise upon the *Nation*. All that praise has been deserved, and I am by no means disposed to go back on it. The *Nation* is one of the few honest and intelligent periodicals ever published in the United States. It stands clear of official buncombe; it prints every week a great mass of news that the newspapers seem to miss; it interprets that news with a freedom and a sagacity that few newspaper editors can even so much as imagine. If it shut up shop then the country would plunge almost unchallenged into the lowest depths of Coolidgism, Rotarianism, Stantaquaism and other such bilge. It has been, for a decade past, the chief consolation of the small and forlorn minority of civilized Americans.

But the *Nation*, in its days, has been a Liberal organ, and its old follies die hard. Ever and anon, in the midst of its most eloquent and effective pleas for Liberty, its eye wanders weakly toward Law. At such moments the old lust to lift 'em up overcomes it, and it makes a brilliant and melodramatic ass of itself. Such a moment was upon it when it printed the paragraph that I have quoted. Into that paragraph—of not over 200 words—it packed as much maudlin and nonsensical blather, as much idiotic reasoning and banal moralizing, as Dr. Coolidge gets into a speech of two hours' length.

II

The new law that it advocated, indeed, is one of the most absurd specimens of jackass legislation ever heard of, even in this paradise of legislative donkeyism. Its single and sole effect would be to exaggerate enormously all of the evils it proposes to put down. It would not take pistols out of the hands of rogues and fools; it would simply take them out of the hands of honest men. The gunman today has

H.L. Mencken (1880–1956) was the most influential newspaperman of his era and a prolific author of iconoclastic books and essays. This is reprinted from The Evening Sun *of Baltimore, November 30, 1925.* *Copyright 1925 by* The Evening Sun. *Republication without credit not permitted.*

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great advantages everywhere. He has artillery in his pocket, and he may assume that, in the large cities, at least two-thirds of his prospective victims are unarmed. But if the *Nation*'s proposed law (or amendment) were passed and enforced, he could assume safely that all of them were unarmed.

Here I do not indulge in theory. The hard facts are publicly on display in New York State, where a law of exactly the same tenor is already on the books—the so-called Sullivan Law. In order to get it there, of course, the Second Amendment had to be severely strained, but the uplifters advocated the straining unanimously, and to the tune of loud hosannas, and the courts, as usual, were willing to sign on the dotted line. It is now a dreadful felony in New York to "have or possess" a pistol. Even if one keeps it locked in a bureau drawer at home, one may be sent to the hoosegow for ten years. More, men who have done no more are frequently bumped off. The cops, suspecting a man, say, of political heresy, raid his house and look for copies of the *Nation*. They find none, and are thus baffled—but at the bottom of a trunk they do find a rusted and battered revolver. So he goes on trial for violating the Sullivan Law, and is presently being psychoanalyzed by the uplifters at Sing Sing.

With what result? With the general result that New York, even more than Chicago, is the heaven of footpads, hijackers, gunmen and all other such armed thugs. Their hands upon their pistols, they know that they are safe. Not one citizen out of a hundred that they tackle is armed for getting a license to keep a revolver is a difficult business, and carrying one without it is more dangerous than submitting to robbery. So the gunmen flourish and give humble thanks to God. Like the bootleggers, they are hot and unanimous for Law Enforcement.

III

To all this, of course, the uplifters have a ready answer. (At having ready answers, indeed, they always shine!) The New York thugs, they say, are armed to the teeth because New Jersey and Connecticut lack Sullivan Laws. When one of them wants a revolver all

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he has to do is to cross the river or take a short trolley trip. Or, to quote the *Nation*, he may "simply remit to one of the large firms which advertise the sale of their weapons by mail." The remedy is the usual dose: More law. Congress is besought to "prohibit the inter-State traffic in revolvers, especially to bar them from the mails."

It is all very familiar, and very depressing. Find me a man so vast an imbecile that he seriously believes that this prohibition would work. What would become of the millions of revolvers already in the hands of the American people if not in New York, then at least everywhere else? (I own two and my brother owns at least a dozen, though neither of us has fired one since the close of the Liberty Loan drives.) Would the cops at once confiscate this immense stock, or would it tend to concentrate in the hands of the criminal classes? If they attempted confiscation, how would they get my two revolvers—lawfully acquired and possessed—without breaking into my house? Would I wait for them docilely—or would I sell out, in anticipation, to the nearest pistol bootlegger?

The first effect of the enactment of such a law, obviously, would be to make the market price of all small arms rise sharply. A pistol which is now worth, second-hand, perhaps

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$2, would quickly reach a value of $10 or even $20. This is not theorizing; we have had plenty of experience with gin. Well, imagining such prices to prevail, would the generality of men surrender their weapons to the Polizei, or would they sell them to the bootleggers? And if they sold them to the bootleggers, what would become of them in the end: would they fall into the hands of honest men or into the hands of rogues?

IV

But the gunmen, I take it, would not suffer from the high cost of artillery for long. The moment the price got really attractive, the cops themselves would begin to sell their pistols, and with them the whole corps of Prohibition blacklegs, private detectives, deputy sheriffs, and other such scoundrels. And smuggling, as in the case of alcoholic beverages, would become an organized industry, large in scale and lordly in profits. Imagine the supplies that would pour over the long Canadian and Mexican borders! And into every port on every incoming ship!

Certainly, the history of the attempt to enforce Prohibition should give even uplifters pause. A case of whisky is a bulky object. It must be transported on a truck. It can not be disguised. Yet in every American city today a case of whisky may be bought almost as readily as a pair of shoes despite all the armed guards along the Canadian border, and all the guard ships off the ports, and all the raiding, snooping and murdering everywhere else. Thus the camel gets in and yet the proponents of the new anti-pistol law tell us that they will catch the gnat! Go whisper it to the Marines!

Such a law, indeed, would simply make gun-toting swagger and fashionable, as Prohibition has made guzzling swagger and fashionable. When I was a youngster there were no Prohibition agents; hence I never so much as drank a glass of beer until I was nearly 19. Today, Law Enforcement is the eighth sacrament and the Methodist Board of Temperance, Prohibition and Public Morals by itself authority for the sad news that the young of the land are full of gin. I remember, in my youth, a time when the cops tried to prohibit the game of catty. At once every boy in Baltimore consecrated his whole time and energy to it. Finally, the cops gave up their crusade. Almost instantly catty disappeared.

V

The real victim of moral legislation is always the honest, law-abiding, well-meaning citizen—what the late William Graham Summer called the Forgotten Man. Prohibition makes it impossible for him to take a harmless drink, cheaply and in a decent manner. In the same way the Harrison Act puts heavy burdens upon the physician who has need of prescribing narcotic drugs for a patient, honestly and for good ends. But the drunkard still gets all the alcohol that he can hold, and the drug addict is still full of morphine and cocaine. By precisely the same route the *Nation's* new law would deprive the reputable citizen of the arms he needs for protection, and hand them over to the rogues that he needs protection against.

Ten or fifteen years ago there was an epidemic of suicide by bichloride of mercury tablets. At once the uplifters proposed laws forbidding their sale, and such laws are now in force in many States, including New York. The consequences are classical. A New Yorker, desiring to lay in an antiseptic for household use, is deprived of the cheapest, most convenient and most effective. And the suicide rate in New York, as elsewhere, is still steadily rising. □

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Government Deposit Insurance: A Dumb Idea

A headline on an Associated Press story in mid-June read, "Doubling Deposit Insurance Opposed." Surprisingly, the Clinton administration—which can usually be counted on to support anything that extends the reach of government—had come out against a proposal to raise the amount of bank deposits insured by the Federal Deposit Insurance Corporation from $100,000 to $200,000. Apparently, broken clocks aren't the only thing that are right twice a day.

The hike was proposed not by savers, pensioners, or consumer groups but by groups representing banks, which was no surprise at all. Bailing out big banks and their big depositors is a form of banker welfare in which the bankers get well and you and I pay the fare. Federal Reserve Chairman Alan Greenspan was right on the money when he said that the plan would give "increased subsidies to upper-income individuals."

The banker-welfare advocates will surely not drop the issue any time soon, which just might give the nation an opportunity to reconsider the larger question: Should government be insuring bank deposits at all? Count my vote in the "no" column.

The federal government first got into the deposit insurance business in the 1930s, and ever since, the public has largely accepted the principle that for the sake of the general economy, banks shouldn't be allowed to fail. But there's a huge "moral hazard" problem with bank bailouts. If government sends the message that banks can't fail and that it will act to prevent failures, it will actually produce the kind of bad behavior that defines a failing bank. After all, why behave in a sober fashion if the government will pay you to get drunk?

If government policy declares, "We won't bail out the little ones, only the big ones whose failure would have massive ripple effects," then you only create a bigger moral hazard because big banks can and will make big mistakes if they know they'll be taken care of. That works against the ability of small banks to compete, which in time undermines the soundness of the banking system in general.

Two analysts at the Federal Reserve Bank of Minneapolis, Ron J. Feldman and Arthur J. Rolnick, have argued that the way the government protects banks and their depositors through its deposit insurance has indeed created major problems of its own:

> While other explanations for the huge number of bank failures [in the 1980s] are plausible, we view too much protection as a critical underlying cause. Once its depositors and other creditors are fully protected, a bank is likely to take much more risk than it would otherwise. This is especially true at banks where owners can diversify their risk or at banks that are seriously undercapitalized. In effect, it's heads the bank wins and tails the taxpayer loses.

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We should not assume, by the way, that any failure by any bank is automatically something that must be artificially prevented or that would automatically cause disastrous ripple effects if it weren't. The fact that a bank *can* fail (or any business, for that matter) tends to promote healthy practices that minimize the problem. And when a bank does fail, it does not mean that all of its depositors' money disappears. A failed bank in a free market can be bought out by another bank, or otherwise emerge from an orderly bankruptcy process stronger than before, though its investors and depositors may lose some of their money.

Federal deposit insurance was intended, in part, to ward off widespread bank runs that are symptomatic of financial panic. It has indeed accomplished that, but not without the law of unintended consequences operating in the opposite direction. As economist George G. Kaufmann put it in a recent issue of the *Cato Journal*, "The absence of runs removed a major automatic mechanism by which troubled banks were previously closed and resolved. Runs on troubled banks caused liquidity problems, which forced regulators to suspend their operations until their solvency could be determined. In this way, depositors prevented insolvent institutions from remaining in operation for long and thereby limited the ability of these banks to enlarge their losses."

The savings and loan crisis of the 1980s is a perfect example of the massive harm government insurance can cause. In 1980, under the Carter administration, the Congress passed a deregulatory act that gave S & Ls greater freedom to invest in a variety of instruments. So far so good. That part was needed so that S & Ls could compete. But at the same time, government raised the amount of deposits that it would insure from $40,000 to $100,000. Moreover, the Federal Savings and Loan Insurance Corporation's flat-rate premiums were retained.

In other words, S & Ls that used their new freedom to invest in shaky or even unconscionable things would continue to pay no more in insurance premiums than the S & Ls that invested prudently! (Can you imagine the signal it would send if auto insurance companies charged the same premiums to careful and drunk drivers?)

What Congress should have done was to privatize deposit insurance. No private insurer would ever charge banks or S & Ls with bad lending practices the same low premiums it charged those with sound practices. Only bureaucratic planners working in government do such idiotic things, and then in infantile fashion, blame the free market for the results.

Sadly, those who think government must provide deposit insurance fail to realize how much of the problem they see is already the result of government's own handiwork. If banks fail, the free market is blamed and government is called on to intervene.

It is superficial and wrong to conclude that bank failures require government bailouts. The best thing government can do if it wants to avoid such disasters is to foster the soundest possible environment for good business and banking practices: Don't erode the currency through deficit spending and credit expansion, don't adopt ludicrous deposit insurance practices, don't reward banks for unsound lending practices.

This isn't pie-in-the-sky theory. We should now know from actual practice that government monetary and fiscal policies have created far more bank failure problems than an unfettered free market could ever conceivably create if it wanted to. Like any other risky activity, banking should secure its insurance from watchful, responsible private entities rather than from politicians and the bureaucrats they employ.

Federal deposit insurance should not be doubled. It ought instead to be privatized! □

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IDEAS ON LIBERTY
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A Constitutional Counterrevolution

by Charlotte Twight

Given America's carefully crafted constitutional restrictions on central government power, how is it that intrusive federal powers over the lives of ordinary Americans took root in the twentieth century? If you had just fifteen minutes to explain it to James Madison, what would you say?

Here is what I would say:

Mr. Madison—James, if I may—I am deeply saddened by the facts I must describe. You and your colleagues anticipated many things, and the product of your labors has made possible an unprecedented degree of freedom in this country for more than 200 years. But your work is now in jeopardy: liberty is being crowded out by an ever more intrusive central government. Although many others have tried to explain how this occurred, let me give you my own insight about it—admittedly only a partial explanation, but nonetheless one that identifies a key, and often overlooked, source of liberty's increasing peril.

As I see it, here is what happened. During the twentieth century, legislators, Supreme Court judges, and executive branch officials began to perfect techniques for deflecting and curtailing people's resistance to actions that increased the power of the central government. You and your contemporaries well understood the dangers of overreaching government and, through the Constitution, tried to limit its power. But living in a society so recently chafing under British rule, a young nation whose people yearned for freedom, it would have been difficult to imagine how America's own elected and appointed officials—without triggering public censure and usually without amending the Constitution—might take systematic actions to erode the explicit constitutional limits on their power that you designed.

Yet that is exactly what occurred. The techniques that emerged involved a bevy of government actions sharing one defining characteristic: they increased other people's costs of resisting government expansion. In each case, government officials made it more difficult or costly for people to perceive, or take action to resist, federal power-expanding measures. It is what I call "political transaction-cost manipulation": government officials' deliberate alteration of people's costs of undertaking collective political action in matters that affect the scope of government authority.[1]

These federal actions have included misrepresenting the nature and consequences of government action, proceeding incrementally, concealing the cost of government actions, tying controversial measures to more popular legislative bills, hiding unpopular provisions in omnibus bills, concentrating the benefits and dispersing the costs of government action, changing the Constitution through the back door of the Supreme Court rather than

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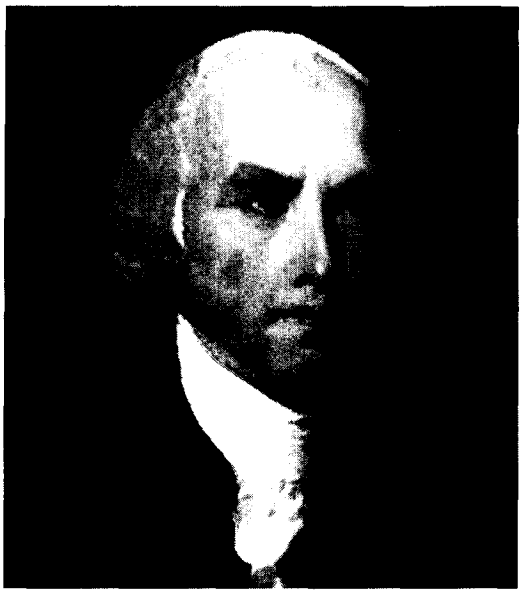
by constitutional amendment, and myriad analogous strategies. As I'll explain in a minute, diverse efforts in the twentieth century to expand the federal government's power all have involved such strategies—implying that initial public acquiescence to new government institutions often did not reflect true public consensus. Once in place, however, institutions exercising new federal powers subsequently channeled ideological change, and nurtured special interests, in ways that supported the new regime.

Consider a few examples. The first one is sure to infuriate you, James. Remember the care you took in providing for the constitutional amendment process? You wisely and deliberately made it very cumbersome, trying to assure that the Constitution's provisions could not be altered without great effort and widespread agreement on the desirability of the changes. In short, you hoped to make it very costly for people to alter constitutionally established limits on the central government's power.

During the twentieth century, however, the U.S. Supreme Court often served to bypass the amendment process. Increasingly, Supreme Court decisions changed the Constitution's long-established meaning without benefit of constitutional amendment, reinterpreting the document—sometimes literally changing the definition of its words—to broaden the central government's powers far beyond what you and the other Founders envisioned. Confronted with such unilateral action by the Supreme Court, how could people then preserve their liberty?

Of course, they themselves could seek a constitutional amendment to spell out more concretely the original meaning of the Constitution and thereby bind the Supreme Court. But the cumbersome amendment process, meant to constrain those who would change fundamental constitutional protections, then impeded those who desired to preserve the original meaning of the Constitution. In other words, the political transaction costs that you intended to be a barrier to those who desired to change the Constitution's substance instead served as a barrier to those who desired to *uphold* the Constitution's original substance.



James Madison

It is a classic type of political transaction-cost manipulation.

The Commerce Clause

One example is the Supreme Court's reinterpretation of the Constitution's interstate commerce clause in a 1942 case called *Wickard v. Filburn*. As you recall, you and the other drafters gave the federal government power over interstate commerce ("commerce among the several States") to make sure that the individual states did not erect trade barriers against one another. Commerce within the separate states, intrastate commerce, was beyond the central government's authority. In *Wickard*, however, the U.S. Supreme Court proclaimed that the central government had power to regulate even the wheat that an individual wheat farmer grew on his own land, within a single state, for his own family's consumption. The Court's rationale was that if the farmer had not grown that wheat for his family's consumption, he would have had to purchase wheat that might have moved in interstate commerce. Since locally produced and consumed wheat "competes with" wheat moving in commerce, this purely local activity was deemed to affect interstate commerce and thus justify federal regulation. The

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Supreme Court thereby threw the constitutional doors wide open, allowing the central government to embed itself into virtually any economic activity, no matter how local.

Throughout the twentieth century, this key tactic of judicial reinterpretation allowed the Supreme Court to effectively trump the constitutional amendment process that you designed. If people wanted to preserve the limits on central government power that you wisely created, the defenders of the original Constitution—not its opponents—would have to undergo the high transaction-cost process of constitutional amendment. With the deck stacked against such a costly undertaking, no amendment materialized to shield intrastate commerce or other realms from the federal government's growing regulatory reach.

The spirit of the preceding example pervades many government actions that have eroded liberties originally protected by the Constitution. Once government officials learned that they could change the cost to others of defending their liberties, the possibilities were endless. Let me recite but a few.

Consider the federal income tax. Yes, I know that you provided that no direct federal taxes could be imposed unless they were apportioned among the states "in Proportion to the Census or Enumeration" mandated by the Constitution. But a federal income tax "without apportionment among the several States, and without regard to any census or enumeration" was legalized in 1913 by explicit constitutional amendment.

In implementing a federal income tax, government officials repeatedly increased the cost to citizens of correctly appraising and actively resisting the tax. First, it was sold to the public as a tax only on the very rich. Later, despite the government's claim that the income tax was a "voluntary" tax system, a 1943 law required employers to take the tax money from each employee's paycheck, before the tax was due, without the employee's consent. This nonconsensual "withholding" of federal income taxes dramatically increased the cost to private individuals of resisting the growth of federal power. Nonpayment was no longer a feasible means of resistance to overtaxation.

Further subduing resistance, this collection method effectively hid the full magnitude of an individual's tax payment. With passage of the 1943 withholding law, taxpayers no longer had to write a check for the full amount of income taxes due. Indeed, many came to associate the tax due date with money received from the government in the form of tax refunds rather than money paid to the government. Their tax burden thus obscured, most Americans today cannot come close to accurately stating their total federal income tax payments for the prior year.

Fundamental notions of the rule of law held sacred by your generation, James, were gradually abandoned as the federal income tax grew, with equal treatment under the law redefined to countenance treating people with different incomes—or even the same income—unequally under federal tax law. Today, with the bottom 50 percent of earners paying only 4.3 percent of the federal income taxes collected, is it any wonder that tax resistance no longer poses a viable threat to the new political power structure? With half the people paying hardly any federal income tax, the other half largely unaware of the full magnitude of their tax, and many in both categories intent on manipulating the political system to their personal advantage, a majority of the people now usually tolerate any plausible federal income-tax increase, enabling the central government's control over resources to continue to grow. The political way to wealth thus predominates, the federal income tax now one of its primary engines.

Incremental Intrusions

All these measures were instituted incrementally, another transaction-cost-increasing strategy for minimizing resistance to expansion of federal power. For instance, the political feasibility of income tax withholding in 1943 was enhanced by prior legislation mandating employer withholding of payroll (Social Security/FICA) taxes, instituted by the 1935 Social Security Act. Employers and employees already had gotten used to it; with the tax withholding machinery already in place, the next step was that much easier.

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Government officials used similar transaction-cost-manipulating strategies in securing adoption of that 1935 Social Security law. They were only able to gain passage of the law by tying it to other more popular programs such as needs-based old-age assistance, unemployment compensation, and maternal and child health services—thereby deliberately increasing the costs to people of resisting the power grab represented by Social Security. Through that program, the central government now takes 12.4 percent of the wages of every working American (up to maximum taxable earnings of $76,200) through a Ponzi-type system designed to make every retired American dependent on federal government checks, while preventing people from instead investing that money in private accounts for their own retirement.

Where is the transaction-cost manipulation in this program today, you ask? From the beginning, government officials got employees to tolerate this tax by claiming that it is "split" between employers and employees—that the employer "matches" the "contribution" of the employee, thereby doubling the amount paid into Social Security on the employee's behalf. It is a lie. Although the employer does write a check to the government on behalf of the employee, economists have understood for decades that the employee actually bears most of the burden of the so-called "employer's half" of the Social Security tax in the form of lower wages; so employees actually bear nearly the full 12.4 percent burden of the payroll tax. But most Americans today continue to believe the long-repeated lie.

Moreover, although the federal government continues to claim that people who have paid their payroll taxes throughout their working lives have a contractual "right" to their Social Security benefits, the Supreme Court long ago explicitly stated that they have no such right.[2] There is more (for instance, people are forced to pay income taxes, unwittingly in most cases, on the Social Security payroll taxes extracted from their paychecks—money they never even received!), but I must move on.

As you can see, James, government officials no longer embrace the views of people who think as you and I do. Discussion of the original meaning of the Constitution, limits on the power of government, fundamental human liberties not "granted" by the government—many federal officials regard such perspectives as plainly anathema to their financial and ideological interests. How might the government limit the prevalence of these supposedly offensive views?

Increasingly, government officials have used public education for that purpose. As in the other cases, the relevant laws were both passed and implemented by manipulating political transaction costs. For example, federal officials leveraged the National Defense Education Act (1958) into law by means of the Sputnik scare, using false claims of national emergency to build a program that channeled federal funds to virtually all types of educational programs. Senator Strom Thurmond of South Carolina clearly identified the divergence between the rhetoric and the reality of the National Defense Education Act:

> This bill . . . although it purports to be for the specific purpose of promoting the national defense, is, in actuality, general Federal aid to education. . . . [T]his bill will not appreciably contribute to the national defense. Neither the scholarship program nor the student loan program are limited in any way to persons undertaking a course of study considered to be critical to our national defense. Under either of these programs, a participating student might study social welfare work, automobile driving or, for that matter, flower arranging.[3]

While continuing to deny the growing federal control over public education, government officials used this law and others that followed (such as the 1965 Elementary and Secondary Education Act) to influence the curriculum and thereby change the worldview of countless millions of Americans.

Engines of Propaganda

The results now dominate U.S. culture and politics. Public schools have become engines of propaganda supporting a vastly expanded

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presence of the central government in the lives of ordinary Americans. Deliberate reshaping of the values and ideologies of the children is thus another manifestation of government manipulation of political transaction costs, changing young people's information costs in ways that actively curtail resistance to expanding federal authority.[4]

Today, ideologies shaped by public schooling allow government power to continue to grow. Federal influence over the minds of American children grew enormously with the 1994 Goals 2000: Educate America Act; the National Skill Standards Act; the Educational Research, Development, Dissemination, and Improvement Act; the School-to-Work Opportunities Act; the Improving America's Schools Act; and the 1998 Workforce Investment Act. In securing passage and acceptance of this legislation, political transaction-cost manipulation was again an important tool. Ordinary Americans were encouraged to perceive these laws as strengthening the academic rigor of public schools. Yet underneath that veneer of appealing rhetoric, the new laws established federal powers and policies that contravened the wishes of many affected communities, weakened the academic rigor of public schools, and accorded the federal government increasing influence over the education, ideological orientation, and career paths of American children.

Under the rubric of "parental assistance," Goals 2000 even required federal grant recipients to fund "Parents as Teachers" and "Home Instruction for Preschool Youngsters" programs, defined to include "regularly scheduled personal visits" with parents of preschool children by government-supported "certified parent educators." The federally promoted slogan embracing "outcome-based education" turned out to denote social outcomes desired by federal authorities, not academic outcomes desired by parents.

Medical Incrementalism

Federal officials have used similar tactics to gain increasing power over Americans' medical care. Culminating a decades-long incremental process, passage of the original 1965 Medicare bill was accomplished only by tying the legislation to politically irresistible Social Security benefit increases, once again increasing the costs to private individuals (and legislators) of resisting the measure. As the quest for expanded federal power over people's medical care continued, the same transaction-cost-increasing techniques were employed again and again. The 1996 Health Insurance Portability and Accountability Act (HIPAA), for instance, tied popular provisions increasing the portability of people's health insurance to unpublicized requirements for a "unique health identifier" for each American, to be used in conjunction with an HIPAA-mandated uniform national electronic database of personal medical information. The 1996 act empowered the federal government to require detailed information, at its discretion, regarding what lawmakers called "encounters" between doctors and patients. As a result of HIPAA provisions misleadingly labeled "administrative simplification," doctors now may be required to divulge detailed health information regarding patients' physical and mental health for inclusion in the national electronic database, identified by each patient's unique health identifier. Swayed by the appealing political rhetoric that accompanied the 1996 bill, most people embraced it, only to be startled two years later when the U.S. Department of Health and Human Services began to implement the mandated unique health identifier.

Equally alarming is the systematic surveillance of ordinary Americans now being carried out by the federal government, also largely a product of political transaction-cost augmentation. For instance, when Congress passed the Bank Secrecy Act in 1970, misrepresentation again was instrumental. How could people know that this innocuous-sounding bill contained provisions requiring banks to make permanent copies of the checks, deposits, and other financial transactions of each and every bank account holder? Detailed portraits of law-abiding individuals were thereby created at the behest of the central government.

Similarly, by increments, the federal government authorized widespread federal, state, and

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local government use of Social Security numbers (SSNs), even though they were approved in 1935 only when officials assured Americans that the numbers would be used exclusively to identify their Social Security accounts. During the 1980s and 1990s, a docile citizenry further acquiesced as the federal government, by increments, required parents to get SSNs for very young children—now even newborns—in order to claim them as "dependents." SSN-based dossiers now can be developed on young children, tracking them from infancy forward through newly authorized federal databases describing their educational experiences, medical histories, future jobs, financial transactions, the very fabric of their private lives. Imagine the power thereby put in the hands of federal officials, and the diminution of Americans' freedom to speak their minds without fear of government reprisal. It is no longer the country you envisioned, James.

As your generation so well understood, people in a free society must decide how much power to cede to the central government, where to draw the line between the private and public spheres. Your generation allowed the central government but little power, influenced as you were by ideologies of liberty and by awareness of the personal costs of expanded central power. My generation, by contrast, ceded enormous power to the central government, having lost ideologies of liberty through public education and by long-standing exposure to an extensive government presence in their lives.

In my view, James, one overarching mechanism making this transformation possible has been government officials' manipulation of political transaction costs. In each case that I have studied in detail—Social Security,[5] income tax withholding,[6] Medicare and its progeny,[7] public education,[8] government data collection,[9] even asbestos regulation[10]—government officials seeking new federal powers have deliberately increased the cost to private citizens of understanding the proposed measures and taking political action to resist them. The particular transaction-cost-increasing strategies have varied, but they all have served to reduce or deflect resistance to the growth of government.

Contrived Costs

Some years ago I developed a taxonomy of these strategies showing that government manipulation of political transaction costs falls into two broad categories: manipulation of private agreement and enforcement costs (meaning the costs to individuals of reaching and enforcing collective agreements on where to draw the line between governmental and private spheres of action) and manipulation of information costs relevant to people's decisions regarding where to draw that line.[11] Both categories involve the creation of what I call "contrived" political transaction costs.

As you can see, all the examples given above fall into these broad categories. One type of agreement and enforcement cost identified in the taxonomy involves "unilaterally changing the locus or scope of government decision-making authority in ways that shift the transaction-cost burden entailed in effectuating or forestalling change in the role of government." It sounds cumbersome, but you get the idea: the Supreme Court's unilateral expansion of the Constitution's interstate commerce clause, sidestepping the constitutional amendment process, is a prime example in this category. Income tax withholding and the purported "splitting" of the payroll tax described above involve a type of information-cost manipulation captured in the taxonomy as "forms of taxation that change people's perception of the tax burden imposed on them." Incrementalism, such as that practiced in increasing the federal government's power over public education and health care, is shown to be a separate form of government manipulation of political information costs. And the use of mellifluous-sounding titles for hurtful legislation is an example of information-cost manipulation involving "semantic efforts to alter public perception of the costs and benefits of government activities." I promised that this would take just fifteen minutes, so I can't describe all the categories and examples that I have suggested elsewhere. But the main point is clear.

Mr. Madison, we are losing the liberty for which your generation committed their "Lives . . . Fortunes, and . . . sacred Honor" in part

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because government officials have perfected techniques for reducing effective resistance to liberty's erosion. Those techniques characteristically have entailed government manipulation of political transaction costs. Today, no matter how many angry citizens call radio talk shows, few take serious political action to oppose government's expanded role, in part because of the artificially increased personal costs of so doing. Federal officeholders, in turn, continue to find the strategy appealing because it frequently enables them to obtain results they want without resort to overt coercion, relying instead on changing people's individual incentives to resist.

No conspiracy underlies these developments. Rather, they reflect personal incentives (political, economic, and ideological) impelling self-interested federal legislators, Supreme Court justices, bureaucrats, and other executive branch officials to create transaction-cost barriers for people who hold different political views.

Mr. Madison, a constitutional counterrevolution has occurred, without a shot being fired, and with barely a whimper from an increasingly ill-educated populace. Unfortunately, the longer it endures, the less the likelihood of liberty's restoration, owing to the ideological changes that accompany long-standing exercise of expanded government power. As the twentieth century ends, let us hope that government-spawned transaction-cost barriers to liberty-restoring change have not permanently tipped the scales against the freedom that we both hold so dear. □

1. Transaction costs, in the more traditional setting of economic markets, include contract negotiation and enforcement costs that are attributable to the multiparty character of market exchange. The political analog of market exchange is collective political action that alters the role and scope of government. *Political transaction costs*, as that term is used here, therefore denote transaction costs borne by individual decision makers (such as voters or legislators) in undertaking collective action that alters the effective power of government—costs of reaching and enforcing collective agreements that define the role and scope of government. To individuals, political transaction costs comprise all their costs of perceiving, and of acting on their assessment of, the net costs of particular government actions and authority. Alternatively, such political transaction costs could be labeled "constitutional-level" transaction costs, as I have done elsewhere, to emphasize their influence on the nature and extent of government authority over private decision-making tolerated by the public. For a more complete discussion, see my "Government Manipulation of Constitutional-Level Transaction Costs: A General Theory of Transaction-Cost Augmentation and the Growth of Government," *Public Choice*, Vol. 56, No. 2, pp. 131–52 (1988).

2. *Flemming v. Nestor*, 1960. See also *Helvering v. Davis*, 1937.

3. U.S. Senate, Committee on Labor and Public Welfare, *National Defense Education Act of 1958*, Senate Report No. 2242, 85th Congress, 2nd Session (August 8, 1958), p. 51.

4. See Thomas Sowell, *Inside American Education: The Decline, the Deception, the Dogmas*, (New York: Free Press, 1993), pp. 36–37, 296–97; John R. Lott, "An Explanation for Public Provision of Schooling: The Importance of Indoctrination," *Journal of Law and Economics*, Vol. 33, pp. 199–229 (1990); and Paul A. Cleveland, "Economic Illiteracy," *Ideas on Liberty*, April 2000, pp. 32–33.

5. Charlotte Twight, "Channeling Ideological Change: The Political Economy of Dependence on Government," *Kyklos*, Vol. 46, No. 4, pp. 497–527 (1993).

6. Charlotte Twight, "Evolution of Federal Income Tax Withholding: The Machinery of Institutional Change," *Cato Journal*, Winter 1995, pp. 359–95.

7. Charlotte Twight, "Medicare's Origin: The Economics and Politics of Dependency," *Cato Journal*, Winter 1997, pp. 309–38, and "Medicare's Progeny: The 1996 Health Care Legislation," *The Independent Review*, Winter 1998, pp. 373–99.

8. Charlotte Twight, "Federal Control Over Education: Crisis, Deception, and Institutional Change," *Journal of Economic Behavior and Organization*, December 1996, pp. 299–333.

9. Charlotte Twight, "Watching You: Systematic Federal Surveillance of Ordinary Americans," *The Independent Review*, Fall 1999, pp. 165–200.

10. Charlotte Twight, "From Claiming Credit to Avoiding Blame: The Evolution of Congressional Strategy for Asbestos Management," *Journal of Public Policy*, Vol. 11, No. 2, pp. 153–86 (1991).

11. Charlotte Twight, "Political Transaction-Cost Manipulation: An Integrating Theory," *Journal of Theoretical Politics*, Vol. 6, No. 2, pp. 191–218 (1994).

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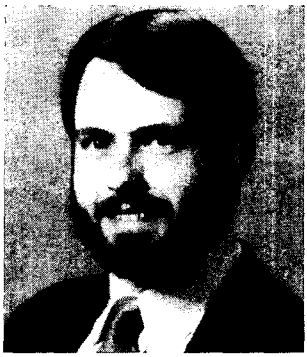

The End of U.N. Peacekeeping

The dismal experience of Sierra Leone has struck yet another blow against United Nations peacekeeping. America's U.N. Ambassador, Richard Holbrooke, plaintively argues that Sierra Leone "is not a metaphor for UN peacekeeping." But how could it be otherwise?

Even U.N. Secretary General Kofi Annan admits that the U.N. can't do the job. Naturally, his answer is to strengthen U.N. operations.

Sierra Leone is one of a long list of African slaughterhouses: Angola, Burundi, Chad, Congo, Ethiopia, Liberia, Mozambique, Rwanda, Somalia, Sudan, Zaire. The dead have ranged up into the millions. In none of them has the U.N. stopped the killing, let alone resolved the underlying conflicts.

Diplomatic pressure, expressions of international outrage, and U.N. missions have all failed. People die, refugees flee, children starve, societies disintegrate.

The only strategy that has worked is real military force. In 1995, Sierra Leone's government was tottering before an offensive of the Revolutionary United Front (RUF). For an estimated $35 million, the regime hired the firm Executive Outcomes, made up of South African mercenaries. With the aid of forces from Ghana and Nigeria, Executive Outcomes routed the RUF.

But one requirement of the political "settlement" pushed by the United States was to send Executive Outcomes home. Unfortunately, U.N. peacekeepers proved to be an inadequate substitute.

Earlier this year the RUF seized hundreds of Zambian peacekeepers, stealing their equipment and even their uniforms. Then the guerrillas, with their trademark of chopping off the hands and arms of helpless civilians, began marching on Freetown, the nation's capital, sparking panic—until 800 British soldiers arrived to evacuate Westerners and dig in to defend the city, after which the RUF faded back into the bush.

Indeed, when London announced that its troops' work was done, Sierra Leone's government begged Britain to reconsider. Unable to defend itself and unwilling to trust the U.N., President Ahmad Tejan Kabbah tried to throw his nation back into the arms of its old colonial master.

Secretary General Annan and others routinely blame the United States for the U.N.'s failures since Washington has fallen behind in paying its dues, particularly peacekeeping assessments. But as Thomas Jacobson of the Virginia-based Freedom Alliance points out, total unreimbursed "U.S. support of UN activities, including personnel, financial support, military hardware and coordinated activities" for U.N. operations, ran $8.8 billion last year and $25.2 billion back through 1992. As of the end of last year, America was providing nearly 14,000 military and police personnel in the 19

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ongoing U.N. observation and peacekeeping missions.

Washington currently stations military forces in 141 countries. Most of those deployments are small (one soldier in Mauritius, for instance). But it also maintains large war-fighting garrisons, backed by disproportionate military outlays and an outsize force, throughout Asia and Europe. For this Americans receive little thanks.

Given his organization's inherent flaws, Mr. Annan really isn't talking about the U.N. when he says that "We have to rethink how we equip troops and prepare them for these operations. In this way, they will be able to depend on themselves and do what they have to do." He is talking about being able to call on real soldiers from real countries using real weapons.

That is, Mr. Annan wants to be able to deploy forces that can fight and kill. He wants to forcibly prevent and suppress conflict and impose a political settlement on the combatants.

As retired Australian General John Sanderson, who headed U.N. operations in Cambodia, puts it: "you either go to war or go home." It is a more coherent view, but a much more dubious operation.

It would entangle nations in potentially endless bloodletting in conflicts with no relevance to their security. It would risk soldiers' lives for interests unrelated to those of their own political communities. It would turn Western states into new colonial powers.

In many cases there is no good side to support: Not any of the three factions in the Liberian civil war. Not José dos Santos' communist Angolan government or Jonas Savimbi's Unita opposition. Neither Mobutu Sese Seko nor Laurent Kabila in Zaire (now the Congo). None of the multitude of warlords in Somalia.

In these sorts of cases, writes columnist Charles Krauthammer, "the only serious way to intervene is to occupy. Take over the country, reorder the society, establish new institutions and create the basis for leaving one day." In short, if it's serious enough to have your soldiers kill and be killed, it's serious enough to stick around and finish the job.

In fact, American University professor George Ayittey has proposed just such a U.N. trusteeship for Sierra Leone. That nation "is a failed state, its government long ago hijacked by gangsters," he writes. So create a five- to ten-year occupation to fix the country.

Although formal sponsorship by the U.N., or, alternatively, suggests Mr. Ayittey, the Organization for African Unity, might reduce the obvious colonial overtones, such a plan could only work through sustained military support by the handful of Western states with sizable and effective militaries. Count out Germany and Japan, which are reluctant to act for historical reasons, and other countries, like Brazil, Poland, Romania, Spain, and Ukraine, which have relatively large armies of varying effectiveness, but which are unlikely to volunteer for long-term occupation duty in Africa and Asia. You are down to the United States, Britain, France, Italy, and maybe India, Turkey, and Russia.

And while an international coalition might conceivably agree to garrison Sierra Leone for years, it would be unlikely to simultaneously occupy Angola, Burma, Congo, Kashmir, Liberia, Sri Lanka, Sudan, and the score of other nations that would equally warrant trusteeship. The American republic is particularly ill-suited to turning its 18-year-old men and women into perpetual guardians of a far-flung empire.

Nor would it ever be evident when such trusteeships could end. After all, the former colonies went through decades of a process that, theoretically at least, should have prepared them for independence. Most of them were freed with a full panoply of economic, legal, and political institutions. That didn't prevent them from imploding.

Nor is there any guarantee that a new cycle of five or ten years of foreign rule would be sufficient to counteract the underlying factors, especially past brutality and hatreds, that have sparked so many civil and guerrilla wars. Indeed, memories are long and often outlast even lengthy periods of seeming peace and stability—witness the Balkans.

Yes, we should rethink peacekeeping, as Secretary General Annan desires. But the answer is not, as he thinks, to create a U.N. rapid deployment force and prepare it to fight. □

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P. T. Bauer's Market-Liberal Vision

by James A. Dorn

Today it is not unusual to hear it suggested that the undeveloped world's best hope lies in private property, the market economy, and the rule of law. But a short time ago, that suggestion would have scandalized many audiences. Peter Bauer is a major reason for that shift.

Lord Bauer, the son of a Budapest bookmaker, came to Britain in 1934 to study economics at Gonville and Caius College, Cambridge, where he later became a fellow. His pioneering work in development economics, which began with his study of the Southeast Asian rubber industry in the 1940s and his classic 1954 book, *West African Trade*, led him to question, and later overturn, many of the beliefs held by mainstream development experts. This work was carried out primarily from the London School of Economics and Political Science, where he taught from 1960 to 1983 and where he is currently emeritus professor of economics. In 1982, he was made a life peer and is a fellow of the British Academy.

Bauer's work is characterized by careful observation of how countries move from subsistence to exchange economies, an application of simple economic principles, and a sound understanding of the role of non-economic variables in promoting material advance. As he noted in his book *Dissent on Development*, "Economic achievement depends primarily on people's abilities and attitudes and also on their social and political institutions. Differences in these determinants or factors largely explain differences in levels of economic achievement and rates of material progress."

What Bauer observed was that people in poor countries respond to price incentives just like people in rich countries. He also observed that when people have the freedom to own property and to trade, and when government is limited to the protection of those rights, they have a better chance of achieving prosperity.

The intellectual climate in the late 1950s was not hospitable to Bauer's critique of state-led development policy. In 1956, Swedish economist Gunnar Myrdal, later a Nobel laureate, wrote, "The special advisers to underdeveloped countries who have taken the time and trouble to acquaint themselves with the problem . . . all recommend central planning as the first condition of progress."

That view persisted well into the 1960s and has only recently been supplanted by a more market-friendly view. It was not until after the collapse of communism in Eastern Europe and the Soviet Union that the World Bank admitted, in its 1997 development report, "State-led intervention emphasized market failures and accorded the state a central role in correcting them. But the institutional assumptions implicit in this world view were, as we all realize today, too simplistic."

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Bauer recognized, as noted in his book *Reality and Rhetoric*, that "the critics who propose replacing the market system by political decisions rarely address themselves to such crucial matters as the concentration of economic power in political hands, the implications of restriction of choice, the objectives of politicians and administrators, and the quality and extent of knowledge in a society and its methods of transmission."

In observing economic reality and adhering to the logic of the price system, Bauer refuted key propositions of orthodox development economics, the most basic one being the idea of a "vicious circle of poverty." Poor countries were said to be poor because people had low incomes and could not generate sufficient savings to allow for capital accumulation, one of the prerequisites for economic growth, as spelled out in mainstream growth models. Bauer observed that many people and many countries had moved from poverty to prosperity and that large-scale capital investment is neither necessary nor sufficient for material advance. His study of small holdings in the Malaya (now Malaysia) rubber industry and his observation of the importance of small-scale traders in West Africa convinced him that the reality of development was different from the rhetoric of development experts.

A corollary of the vicious circle is that poor countries cannot become rich without external aid from developed countries. However, the nations that have become rich had no access to foreign aid, while those that have received substantial external aid are for the most part still poor, as in Africa. So Bauer argued that foreign aid is more likely to perpetuate poverty than to alleviate it. And history has borne him out.

Bauer also strongly disagreed with the widely held view that population growth is a drag on development. In his essay "Population Growth: Disaster or Blessing?" he wrote, "Economic achievement and progress depend on people's *conduct* not on their *numbers*." Unlike many of the development experts who wanted to use government to "help the poor," Bauer thought that poor people could lift themselves out of poverty through their own efforts, if only governments would safeguard both economic and personal freedom. When people are free to choose and bear the responsibility for their choices, as they do under a system of private property and free markets, they will be more able to improve themselves and provide for their families—as well as have stronger incentives to do so—than when they are dependent primarily on the state.

Politicizing Life

Bauer was one of the first economists to clearly see that state-led development policies and the quest for "social justice" would politicize economic life, impair individual freedom, and fail to achieve long-run prosperity for the majority of people. He also noted that those countries that had the fewest commercial contacts with the West were the least developed. Thus, he recognized the dynamic gains from free trade. In his most recent book, *From Subsistence to Exchange and Other Essays,* he wrote, "Contacts through traders and trade are prime agents in the spread of new ideas, modes of behavior, and methods of production. External commercial contacts often first suggest the very possibility of change, including economic improvement." Certainly the experience of people in Japan, South Korea, Taiwan, China, and Hong Kong support that observation.

Bauer's emphasis on individual merit, character, culture, property rights, and markets, and his distrust of big government, foreign aid, and the welfare state place him squarely in the classical-liberal tradition. His life's work has been in the broad context of political economy, not in the narrow technical confines of modern development economics or the even narrower space of formal economic modeling.

Bauer's keen understanding of how individuals and nations grow rich comes from practical experience combined with plain economic theory and a deep knowledge of history. His work has stood the test of time. That is why he is now widely recognized as a hero of the revolution in development economics. □

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Is There an Anglo-American Economic Model?

by Christopher Lingle

Those who wish to avoid the painful changes wrought by increasingly competitive and open global markets speak derisively of an Anglo-American economic model. Allusions to a cabal of white men in dark suits involve a racial epithet that is distasteful. It is also ill-informed in that it belittles the enormous contribution made by women, Asiatic peoples, and individuals of African descent to these successful economies.

It may be true that the economies of the United States, Great Britain, and some members of the Commonwealth have performed differently (and for the most part, better) than others. However, the term "Anglo-American economic model" is inappropriate and its use counterproductive. Indeed, it is just as inaccurate as the claims of a Japanese or an Asian economic model, a delusion put in sharp focus by the ongoing crises in that region.

This approach to economic organization is not limited to any particular region of the world. Similarly, suggestions that globalism is an outgrowth of the "Westernization" of the world economies are misguided and misinterpret the dynamics of the process.

What has happened in America or the United Kingdom should not be thought of as the outcome of ethnic, regional, or cultural characteristics that cannot be experienced elsewhere. Instead, it represents a natural and historical evolution toward a harmonious blend of individualism and the market. Many of those who resist the process of institutional innovation are interest groups as well as rule-bound bureaucrats and politicians with a fixation on social engineering, or cultural conservatives who resist the changes wrought by modernization.

Nonetheless, it is useful to examine features and results that set the British and American economies apart. First among the features are their relatively flexible labor markets that allow rapid adjustments within the highly competitive global economy. Second, a rigorous set of laws and rules that provide guarantees for the rights of shareholders and other owners of business enterprises, including adjudication of disputes by competent and independent judges. Third, capital markets tend to be more important than bank lending so that there is more publicly available information on issuers and borrowers. Finally, there is a tendency to curb the power of governments to intervene in the market. This has been accomplished through lower tax rates, deregulation, and privatization.

In terms of results, it is interesting to note that the American and British economies provide incentives that support new job creation. By being more open to competition, they encourage and reward entrepreneurial innovation. Consequently, these economies exhibit unemployment rates that are lower and

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economic growth rates higher than most other industrialized economies.

Implicit in critiques of the so-called Anglo-American model is a presumption that its economic actors are immune to a certain sense of humanity. It is as though the world would be better if kinder, gentler bureaucrats and politicians were more active in guiding economic matters. But there is little evidence that political judgments are consistently made on the basis of fairness. Citizens in most emerging market economies are aware that corruption, cronyism, discrimination, and nepotism come from the politicization of economic life.

An alternative approach to more market-driven economies is an active government hand in protecting certain factions that are presumed to have a stake in the outcome of corporate decisions. In turn, corporate executives are told they must include a contrived group of "stakeholders" even at the expense of the interests of owners (stockholders). From the beginning, the assertion of stakeholders and a demand for their "rights" was flawed on principle and intrusive on the rights of owners.

Advocating stakeholder rights reflects an explicit resistance to an open and competitive global market. Trade unions encourage this notion to protect jobs of their members. Yet this hinders workers and owners of more competitive companies from being successful.

By contrast, the shareholder model is guided by profitability that arises from satisfying customers so that the mutual interests of hired managers and shareholders are also served. The shareholder model is also associated with increased efficiency in the use of capital.

Indifference to Profits

By operating in a competitive capital market, companies operating under the shareholder model are forced to measure performance against profits. In the past, producers in Korea, Japan, and other Asian countries focused on market share and cash flow instead of profitability. Their indifference to profits was prompted by access to cheap capital, which induced them to make imprudent investments that did not consider rates of return. Firms operating under this approach did not build up capital reserves to protect them against downturns.

Looking at the U.S. economy, double-digit interest rates combined with high inflation and unemployment rates during the 1970s prompted substantial restructuring of the American economy during the 1980s. Though inflicting considerable pain, reinventing U.S. businesses set the basis for the current boom. Business and political leaders in Europe and Asia are trying to avoid these adjustments. Indeed, many in the current management elite fear their dismissal will be a condition for access of foreign lending or buyouts.

Opening up domestic capital markets in Asia and Europe may be the single most important change. Liberalization of financial markets would force an unprecedented shift in political and corporate culture. It would allow foreign ownership that can provide initiative and funds to recapitalize their economies as well as restructuring of their industries.

In sum, it would be foolish to believe that the growing dominance of a single economic system associated with globalization is a form of neo-imperialism or is the outcome of a conspiratorial design. To do so ignores the nature of cultural and political evolution. In this dynamic process, those models of organization that provide better results for their respective communities are better able to survive and are imitated by others. □

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The Philosophical Influence Behind the Microsoft Trial

by Barbara Hunter

". . . trial moves rapidly on when the judge has determined the sentence beforehand."

—SPOKEN BY MALVOISIN
in Sir Walter Scott's *Ivanhoe*

It may seem that the Microsoft antitrust trial was anything but rapid, but a closer examination reveals a pattern of inevitability akin to the trial referred to in the quotation above. A review of the testimony shows a highly disturbing pattern, in which the prosecution (directed by Joel Klein, assistant attorney general in the Justice Department's antitrust division, and managed by lawyer David Boies) and U.S. District Court Judge Thomas Penfield Jackson in effect double-teamed Microsoft. The judge made little if any attempt to take the role that would normally be expected of the robed member of the court.

Even worse, when the judge announced his intention to order a breakup of the company, he welcomed an additional brief from Microsoft's opponents while refusing to allow so much as a word of testimony from either the company or its defenders. So much for judicial fairness.

A closer examination of the cast of characters provides some disturbing insights into what was really going on, including the sometimes bizarre announcements and pronouncements that issued both from the court and from the antitrust division. What emerges is an inevitable course leading to a foregone conclusion and waiting only for sufficient time and testimony to create at least some appearance of a genuine trial. A close examination of the government's (and the judge's) statements, both written and oral, reveals a line of logic (if it can be called that) whose nature is not legal but rather philosophical. This is not a mystery; rather, it exemplifies the views of the one man who has had his hand in the process in all its stages—Harvard law professor, self-appointed "cyberlaw expert," and constitutional consultant Lawrence Lessig.

In both the first (trial) phase and the second (sentencing) phase, Lessig served as a "special master" to Judge Jackson, advising him in every detail of the proceedings. The judge, knowing that he was way out of his element in this trial, relied on Lessig day by day. An examination of Lessig's views, as presented in both his interviews and his recently published book, *Code and Other Laws of Cyberspace,* leaves no ambiguity concerning his contention that the companies which design and write computer code threaten to control

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cyberspace and that government must step in to regulate the world of code. Throughout his book the word "regulability" (apparently coined by Lessig to describe his goal) appears again and again. The future, either positive or negative, is measured by the degree to which computer-related companies and other organizations are "regulable" by the government.

One of Lessig's examples of the importance of this regulability deals with the FBI's request to the Internet Engineering Task Force (IETF) to modify the computer protocols so the government could "monitor" (read, spy on) traffic on the Internet. The IETF refused to participate in such a process, and as Lessig told a *Computerworld* interviewer, "There is relatively little the FBI could do to get them to come along."[1] (Perhaps a sigh of relief is in order at this point!)

Here's what followed:

> **But couldn't legislation compel the IETF to comply with such requests?**
> Legislation is only as effective as enforcement mechanisms. It's easy to get Microsoft or AT&T to obey the law because if they don't, you can seize their assets. But the IETF is just this group of individuals—basically, whoever shows up at meetings—and it's not clear whose assets you'd seize.[2]

"Seize their assets"? What country is this anyway? It is noteworthy that in this case no law was involved; it was simply a request from the FBI, with no process, either legislative or judicial, behind it.

In the current Microsoft case, Lessig, at Judge Jackson's request, filed a brief in advance of the judge's initial ruling. In it, this "expert" submitted a classic bit of circular reasoning with the judgment that Microsoft's browser bundling (the original issue in the trial) was illegal because it was "unfairly competitive."[3] As might be expected, the term "unfairly competitive" was never defined, and we are left to wonder when competition crosses the line of fairness and thus warrants intervention by the heavy hand of government.

Lessig's faith in government as protector of the people in the brave new cyber world covers a good deal of ground, as seen in this excerpt from the same interview:

> **You argue that the year 2000 problem stemmed, at least in part, from a lack of government regulation. How might regulation have helped?**
> The question is whether some kind of contract law or tort law might have created the incentive for people to deal with the problem much sooner. We could have minimized the cost of this problem through a law that made it clear that companies would be liable if they produced software [with Y2K flaws]. . . .

This identical point of view can be found in Lessig's book:

> It is a lack of a certain kind of regulation that produced the Y2K problem, not too much regulation. An overemphasis on the private got us here, not an overly statist federal government. Were the tort system better at holding producers responsible for the harms they create, code writers and their employers would have been more concerned with the harm their code would create. . . . And were the intellectual property system more concerned with capturing and preserving knowledge than with allowing private actors to capture and preserve profit, we might have had a copyright system that *required the lodging of source code with the government before the protection of copyright was granted*, thus creating an incentive to preserve source code and hence create a resource that does not now exist but that we might have turned to in undoing the consequences of this bad code.[4]

Anyone with even a moderate familiarity with the process of software design, development, and modification can recognize the ridiculousness of this government-speak notion that all that is necessary to fix software is to pass a law and punish those who fail to work miracles (to say nothing of the concept of legislation jumping in and interfering with the private contract process). In the case of the

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Y2K phenomenon in particular, the seeds of the problem were sown in the very earliest days of what we now refer to as "software design." The modern computer languages had not yet been invented, and code had to be written within the confines of 80-character lines so they would fit on an IBM punch card. The pioneers who designed this early code actually had little faith in the longevity of their code; little did they realize how good those early designs were or how many millions of databases would still be using them. Lessig's "bad code" notion displays the gross ignorance of a current-day "Monday morning quarterback" passing judgment on the early developments of the industry pioneers of 50 years ago, without which the modern software we take for granted today might never have been developed.

But there's more (again from Lessig's interview):

> **Is our antitrust system agile enough for the fast-paced IT [information technology] world?**
> . . . enforcement mechanisms are extremely expensive and cumbersome. . . . if they [Microsoft] lose, there will be the claim that, "Why did it have to take us six years to resolve it?" We will see the government try to find ways to fast-track the process.
>
> **But will the industry have changed so much that the result just doesn't matter?**
> It may be irrelevant with respect to Microsoft. But the reason the government brings these cases [to trial] is not always to deal with a particular party but *to establish precedents* that will govern behavior in the future. So it could have a positive effect, as long as the perspective is on the rules we are trying to set up for the Information Age generally, as opposed to what are we [sic] doing about Microsoft. [Emphasis added.]

There in a nutshell is the heart of the Microsoft case: Litigate Microsoft into compliance with government decrees, even if it costs the company millions of dollars in legal costs, thousands of hours spent preparing testimony and appearing in court (hours that cannot be used for the productive purposes that benefit consumers), and billions of dollars lost to both employees and stockholders as the government (literally) tears the company to pieces. The real purpose is to give the government "fast-track" power to interpose its will on private companies, breaking them up, rearranging them, redesigning them, or whatever else the antitrust bureaucrats decide will be "fairer" than whatever currently exists. It's the precedent that counts.

If we put together the government's entire antitrust division, the special master, and the judge, they would be incapable of developing a single piece of software, much less an operating system, no matter how many years they were given. They know only how to destroy.

Throughout his book, Lessig expresses his faith in government to make things right by the process of regulating. As he sees it (in the following quote regarding "certification" as not just a mechanism but also as a *requirement* for permission to use the Internet), "If commerce alone cannot succeed in establishing these architectures, government is in a strong position to bring about just the changes that commerce needs. . . . The government can help commerce."[5]

In the next chapter of his book, he describes how this "help" is to be accomplished:

> Even if it is hard to regulate behavior given the Net as it is, it is not hard for the government to take steps to alter, or supplement, the architecture of the Net. . . . This is a regulatory two-step: the Net cannot be regulated now, but if the government regulates the architecture of the Net, it can be regulated in the future. And when government regulation of the architecture of the Net is tied to the changes that commerce is already introducing, I argue, the government will need to do very little to make behavior on the Net highly regulable.[6]

With regard to new possibilities for regulation once the government constrains the architecture of code, he writes, "When the con-

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straint is imposed by code . . . Congress can require that telephone companies adopt a code architecture that makes the network wiretap-accessible."[7]

Lessig's faith in government betrays a concept of the purposes of the U.S. Constitution that may seem quite foreign to students of classical constitutional law. In effect, he turns the Constitution on its head, making the government our friend when it uses its regulatory power to "protect" us against those bad private companies. His vision for the Internet is one in which everything we do in cyberspace will be able to be traced by a supposedly benevolent government:

> The government could require Internet service providers (ISPs) . . . to employ software that facilitates traceability by conditioning access on the user's providing some minimal level of identification. Call this a "traceability regulation." Many ISPs would resist it, but the government could then require that major commercial institutions (including credit institutions) be prohibited from dealing with any ISP not certified to be in compliance with the traceability regulation. Some major institutions, in turn, might resist this requirement, but not many. For major institutions in a competitive market, *the threat of government prosecution far outweighs any incentive to violate the law*. These two steps would create a great incentive for local ISPs to facilitate traceability.[8]

Lessig's concept of intellectual property, especially as it applies to copyright law, is far removed from the idea that intellectual property is, above all, property. As he sees it, "Private law creates private rights to the extent that these private rights serve some *collective good*."[9] And later, he states, "The state has an interest in defining rights to private property because private property helps produce a general, and powerful, prosperity."[10] As the author sees it, copyright protection is bestowed by the state to "encourage" intellectual creation, rather than a recognition that intellectual property is property.

Is it any surprise that Judge Jackson's opinions, advised throughout the trial by Lawrence Lessig, evidence no concern for intellectual property rights with regard to the system code developed by Microsoft and produced by, literally, thousands of man-years of labor including research, development, coding, testing, debugging, and all the accouterments of software production?

Distracted by "Fairness"

How has it been possible for this consistently pro-government-control, anti-private-property point of view to dominate the Microsoft antitrust trial? Partly because, from the very beginning, attention has been focused away from the principles of the case and toward the various "fairness" issues that easily distract attention: Has this or that action been unfair? Is this product better than that product? Does this cost more or less than that? Perhaps some of Microsoft's actions may be amenable to litigation between or among persons or companies in courts of law. The real issue here is how the *government* has been given the authority to intervene and to represent the aggrieved parties.

It is noteworthy that the high profile corporations that have joined the attack on Microsoft may be setting a precedent in which the sown wind could reap the whirlwind many times over. If every step taken by a company, not just mergers and the like, must be done with one eye on the job and the other checking whether the bureaucrats in the antitrust division of the Justice Department are going to say, "No, no, we won't let you do that," there will be no winners, just an entire world of losers. "Never send to know for whom the bell tolls; it tolls for thee." □

1. "Who's Controlling Cyberspace?" *Computerworld*, February 7, 2000, http://www.computerworld.com/cwi/story/0,1199,NAV47_STO41085,00.html.
2. Ibid.
3. Ibid.
4. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), p. 232; emphasis added.
5. Ibid., p. 42.
6. Ibid., pp. 43–44.
7. Ibid., p. 45.
8. Ibid., p. 51. (Emphasis added.)
9. Ibid., p. 131. (Emphasis added.)
10. Ibid.

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For-Profit Medicine and the Compassion Motive

by Tom G. Palmer

For-profit medicine must be a terrible and immoral thing. After all, I hear it attacked as such all the time. Indeed, as I write this I'm listening to a bitter attack on private hospitals over the Canadian Broadcasting Corporation. When doctors, nurses, and hospital administrators care only about their income, compassion is replaced by cold-hearted selfishness, many people say. But I just got a new view of the issue when I found myself having to visit two hospitals—one for-profit, the other nonprofit—for relief from a painful and crippling condition.

I recently suffered from a ruptured disk in my spine that caused kinds of pain that I had never imagined possible. I visited a specialist at a local for-profit hospital, and he arranged for me to get an MRI (magnetic resonance imaging) scan within an hour at a nearby for-profit radiology clinic. Then he arranged for me to have an epidural injection to reduce the inflammation of the nerves coming into the spinal column, which were the source of the pains. I was in such agony that I could barely move at all. The for-profit pain clinic at the for-profit hospital I visited was staffed by doctors and nurses who showed me extraordinary kindness and treated me with gentleness. After the nurse had made sure that I understood the procedure and that I could understand all the directions, the doctor who administered the epidural injection introduced herself, explained every step, and then proceeded with both notable professionalism and evident concern for my well-being.

Fast forward a few weeks. My condition, although still painful and debilitating, was greatly improved. My doctor recommended another epidural injection to advance me even more toward a normal state. Unfortunately, the for-profit pain clinic was booked up completely for three weeks. I didn't want to wait that long and called some other hospitals in the area. A very well-known and highly regarded nonprofit hospital could fit me in in two days. I gladly made an appointment.

When I got to the nonprofit hospital, I spoke first with some helpful retired ladies and gentlemen who were wearing neat volunteer uniforms. They were clearly benevolent people, as one might expect in a nonprofit hospital. Then I hobbled with my cane to the pain clinic, where I signed in with the desk. A nurse came out and announced my name and after I identified myself, sat down next to me in the lobby. The interview took place while I was surrounded with strangers. Thankfully, there were no embarrassing questions. I noticed that the other nurses were actually ordering patients about in the imperative voice. One nurse told a lady who was clearly in pain to sit in another chair and after the patient said she was more comfortable where she was, the nurse pointed to the other chair and said, "No. Sit!" When that same nurse approached me, I think that my look told her that I had no intention of being treated like an

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enrollee in obedience school. Wordlessly, she pointed at the examination room, which I entered.

The administering doctor walked in. No introduction. No name. No hand to shake. He looked at my file, muttered to himself, and told me to sit on the bed, pull down my pants, and hoist my shirt. I told him that the procedure had been done before while I was lying on my side, and that that position was more comfortable, since sitting was quite painful. He said that he preferred it with me sitting. I responded that I preferred to lie on my side. He said that sitting allowed better access, which was at least a reason that appealed to my interests as well as his, so I acquiesced. Then, unlike the doctor in the for-profit hospital, he slammed in the needle and injected the medication with such surprising and agonizing force that it caused me to let loose a real yell, quite unlike my previous experience. Then he removed the needle, made a note in his file, and disappeared. The nurse handed me a sheet of paper and pointed the way out. I paid and left.

Profit and Compassion

That's too small a set of experiences on the basis of which to compare for-profit and nonprofit medicine. But it may suggest something about the profit motive and its relation to compassion. It's not that for-profit hospitals alone attract the kindly and compassionate, since the elderly volunteers in the nonprofit hospital were surely kindly and compassionate. But I can't help thinking that the doctors and nurses who worked in a for-profit pain clinic in a for-profit hospital had some incentive to exercise their compassion at work. After all, if I need additional treatment or if I find myself asked for a recommendation, I'm going to think of the for-profit hospital. But I will neither go back to nor recommend the nonprofit hospital, and I think I know why: the doctors and nurses there had no reason to want me to. And now I also understand why the nonprofit hospital could fit me in so quickly. I doubt they had many repeat customers.

The experience does not suggest that profits are a necessary or even sufficient condition for compassion, benevolence, or courtesy. I work at a nonprofit organization, which is dependent on the continued support of a wide base of donors. If I were to fail to fulfill my fiduciary obligations to them, they would stop supporting my work. It so happens that I and my colleagues work there because we share the same concerns as the donors, so the arrangement works out harmoniously. But when the donors, the employees, and the "clients" (whether people in pain or journalists and educators in need of information and insight) don't all share the same values or goals, as in the nonprofit hospital, the profit motive acts powerfully to bring those goals into harmony.

Profits earned in the context of well-defined and enforced legal rights (as distinguished from the profits that accrue to being a brilliant thief) may provide the foundation not of coldness, but of compassion. The search for profit requires that the doctor consider the interests of the patient by putting himself or herself into the patient's position, to imagine the suffering of others, to have compassion. In a free-market economy, the profit motive may be but another name for the compassion motive. □

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Government

The Big One?

A case may be headed to the U.S. Supreme Court that could legally resolve the dispute over what the Second Amendment means. In a reasonable world no ruling would be required, since these words couldn't be more straightforward: "A well regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed."

But politically we don't live in a reasonable world, and some people say those words mean that the individual states may maintain National Guard units. The National Guard wasn't established until 1903 and since 1933 has been under federal jurisdiction. Go figure.*

Moreover, in an important sense, it really doesn't matter what the Second Amendment means. When someone urges the central government to exercise a power, such as putting restrictions on the possession of arms, one should consult the main Constitution, not the Bill of Rights. The matter to be decided is not whether the people have a certain right, but whether the central government has been delegated a certain power. As the framers saw it, in a free republic individuals may *do anything* except that which is expressly and by due process *forbidden*, while government may *not do anything* except that which is expressly *permitted*. Nowhere does the Constitution empower the government to restrict the possession of firearms.

Before discussing the current case, it is worth a quick detour to mention the gun controllers' favorite Supreme Court case, the 1939 *U.S. v. Miller*, which involved the interstate movement of an unregistered and untaxed sawed-off shotgun allegedly in violation of the 1934 National Firearms Act. The case would seem to comfort the gun controllers on two counts: First, the Court said the Second Amendment was written "with the obvious purpose to assure the continuation and render possible the effectiveness of" the militia that the Constitution authorizes Congress to call forth, organize, arm, and discipline.

Second, the case hinged on whether a sawed-off shotgun is a military weapon: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." The case was sent back to the lower courts, but it was not pursued because Miller had died and his codefendant had disappeared.

A close reading shows that this case is no help to what has been dubbed the anti-self-defense lobby. On the first point, the Court quickly noted that the term "militia" refers not to a special force like the National Guard:

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*See my article, "Reading the Second Amendment," *The Freeman: Ideas on Liberty*, February 1998.

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"[T]he history and legislation of Colonies and States, and the writings of approved commentators . . . show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." On July 5, the U.S. Eight Circuit Court of appeals, citing *Miller*, acknowledged that "an individual's right to keep and bear arms is constitutionally protected" (*U.S. v. Hutzell*).

On the second point, the fact that the Court wondered whether a sawed-off shotgun was appropriate for military use implies that weapons unambiguously appropriate for military use (assault rifles, for example) are covered even by the gun controllers' distorted rendering of the Second Amendment.

U.S. v. Emerson

Now we come to the pending case. It has an inauspicious origin. In 1998 the wife of Dr. Timothy Joe Emerson of Texas sued him for divorce. She also applied for a temporary restraining order, a common instrument used to protect a party's financial and other interests. At the hearing on her application Mrs. Emerson said her husband had threatened her adulterous lover over the telephone, but the judge made no finding in that matter.

What Emerson did not know at the time—and what no one informed him—was that at the moment the restraining order was issued, he became a criminal under a little-known 1994 federal law that forbids someone under such an order to possess a firearm. He owns a handgun. Sometime later he displayed the gun to Mrs. Emerson, which led to his indictment for violating the federal statute (but not any state law pertaining to endangerment). Emerson challenged the constitutionality of the law on Second Amendment and other grounds, and—*mirabile dictu!*—Federal District Judge Sam R. Cummings dismissed the indictment because the law "allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights. . . . It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights. . . . That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional."

His opinion goes far beyond that. It is a veritable treatise on the textual structure of and history and political philosophy behind the Second Amendment, drawing on the best classical-liberal constitutional scholars. Savor his words:

> The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.

(The opinion and other material can be found at the Second Amendment Foundation's Web site, www.saf.org.)

The government of course appealed. According to gun writer Neal Knox, last June's hearing before the Circuit Court of Appeals three-judge panel had some noteworthy moments. In response to a judge's question, the Justice Department's lawyer said the Second Amendment protected no individual right. When the judge asked if that meant the government could outlaw his shotgun, the lawyer said yes. The judge, a Clinton appointee, proceeded to list the guns he owns. Then pointing to the senior judge seated next to him, he said "between us [we] have enough guns to start a revolution in most South American countries."

Two of the judges apparently made no effort to hide their view that the government misunderstands the *Miller* case, on which it bases its appeal. For one thing, there is no question about Emerson's handgun being appropriate for military purposes. It's a Beretta Model 92 9mm pistol–a standard military weapon.

As of September 1, the appeals court hadn't ruled yet, but either way, the next stop will likely be the Supreme Court. □

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Does Rape Violate the Commerce Clause?

by Wendy McElroy

Last spring the U.S. Supreme Court struck down as unconstitutional a key section of the 1994 Violence Against Women Act (VAWA). That section allowed a victim of rape or other violence "motivated by gender" to sue the perpetrator for civil damages in federal court for violating her civil rights.

The act was part of the 1994 Omnibus Crime Bill. It established both a federal right to be "free from crimes of violence motivated by gender" and a federal remedy for violating that right: namely, a new tort claim that included both compensatory and punitive damages. The federal claim was not meant to replace punishment by state criminal statutes but to supplement them.

In 1995, Christy Brzonkala became the first person to sue under the act, over a rape that allegedly occurred in her dormitory room while she was a student at Virginia Polytechnic Institute. The men accused—two football players named James Crawford and Antonio Morrison—had been cleared by both a university judicial committee and a criminal grand jury. Nevertheless, Brzonkala brought a case against them in federal court. In 1999 the U.S. Court of Appeals for the Fourth Circuit (Richmond, Va.) ruled against her, saying that Congress had exceeded its constitutional authority in passing VAWA.

U.S. v. Morrison eventually came before the Supreme Court. In its decision the Court stated that the issue under consideration was "Did Congress exceed its powers when it gave victims of sex crimes the right to file civil lawsuits against their attackers?" The Court answered yes. Writing for the 5–4 majority, Chief Justice William H. Rehnquist concluded that a federal civil remedy for such crimes could be justified by none of the constitutional provisions invoked by those who defended the act.

Two constitutional arguments were used by defenders: first, that violence against women interferes with interstate trade and thus violates the Commerce Clause by which Congress may regulate interstate commerce to ensure the free flow of goods and services, and second, that the Fourteenth Amendment protects citizens against violation of due process, which occurred in Brzonkala's case because the state courts were indifferent to violence against women. Both parts of the Constitution had also been used to support the act during lengthy congressional hearings.

The Commerce Clause and VAWA

The Commerce Clause (Article I, Section 8, Clause 3) delegates to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The clause gave a broad grant of authority over commerce to Congress without clearly delineating restrictions on that power. The purpose was to overcome the ten-

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dency of states to interfere with trade through tariffs, which had caused great problems, especially for the smaller states, under the Articles of Confederation. Interstate commerce was deemed to require uniform laws to encourage nationwide trade. According to Roger Pilon in the *Cato Handbook for Congress* (www.cato.org/pubs/handbook/hb105-3.html), "Framers gave Congress the power to regulate—or 'make regular'—commerce among the states. It was thus meant to be a power primarily to facilitate free trade."

Court decisions dating from the days of Franklin Roosevelt's New Deal have interpreted the clause so as to grant Congress the right to regulate virtually anything that affects interstate commerce. As a result, Pilon observes, Congress used the regulation of commerce among the states "for all manner of social and economic purposes, actually frustrat[ing] the free flow of commerce." For example, the Church Arson Prevention Act of 1996 gave the federal government power to prosecute those who burned down churches on the grounds that such arson impeded "individuals in moving interstate." With such broad interpretations, Congress has repeatedly used the Commerce Clause to regulate noneconomic conduct that crosses state lines, such as child custody. Advocates of states' rights have opposed Congress's expanding power under the Commerce Clause because the increased federal authority often infringes on areas that have traditionally been under the jurisdiction of the states.

In recent years, the Court has begun to take a different view, producing a tug of war between it and Congress. In 1995 the Court ruled (5–4) in *U.S. v. Lopez* that Congress had exceeded its authority under the Commerce Clause in passing the Gun-Free School Zones Act of 1990, which prohibited the possession of a firearm within 1,000 feet of a school. In defending the act before the Court, the Clinton Justice Department argued that guns and crime disrupt education, which in turn disrupts the employment opportunities of students and thus interstate commerce. Chief Justice Rehnquist, again writing for the majority decision, stated, "Under the theories that the Government presented, . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign. Thus if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." (In September 1996, Congress passed a revised Gun-Free School Zones Act, confining it to guns that pass through interstate commerce.)

VAWA was another example of an expansive reading of the Commerce Clause. Advocates stated that violence against women and fear of violence reduced women's productivity and mobility as employees. Women commonly lose their jobs after being injured, it was argued. The cost of sexual violence to the national economy was estimated at between $5 billion and $10 billion.

In 1999 the Fourth Circuit Court of Appeals rejected this reasoning on the grounds that to extend the Commerce Clause "beyond the context of statutes regulating economic activities and uphold a statute regulating noneconomic activity merely because that activity, in the aggregate, has an attenuated, though real, effect on the economy, and therefore presumably on interstate commerce, would be effectively to remove all limits on federal authority, and to render unto Congress a police power impermissible under our Constitution."

The Supreme Court agreed.

The Fourteenth Amendment and VAWA

The second argument for the constitutionality of VAWA was based on the Fourteenth Amendment, by which Congress may protect citizens against state violations of their rights. Section 1 of the amendment states in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." During the 1994 congressional debates on the act, dozens of studies were cited to support the contention that women were hindered from seeking relief for crimes such as rape because state judicial systems did not consider them as

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serious as other violent crimes. Brzonkala claimed that the state courts had denied her due process because of their indifference to violence against women. Thus she sought relief in the federal courts.

Chief Justice Rehnquist disagreed with this logic and found, instead, that the Fourteenth Amendment prohibited discrimination only by the states and not by private individuals. The proper defendant under the amendment would have been the state of Virginia, not Morrison. Moreover, he held that following the logic of VAWA would "completely obliterate the Constitution's distinction between national and local authority."

Political observers may be astonished to hear politically correct feminists appealing to the Constitution, which they often vilify as a "dead white male document" drafted by slaveowners. In fact, the Commerce Clause and the Fourteenth Amendment were arguments of convenience and part of a well-established campaign to use civil litigation as a weapon against "gender-motivated" violence. VAWA attempted to use federal remedies if state ones proved unsatisfactory. In her book *Toward a Feminist Theory of the State*, Catharine MacKinnon describes what she calls "Feminist Jurisprudence," writing, "Civil remedies in women's hands would be emphasized."

The civil court system—which deals with private harms—affords at least two advantages for PC feminists. First, it allows women to punish "abuses" that fall outside the criminal statutes. Second, it has less stringent standards than the criminal court system.

To address the first advantage: men who are not criminals, and so are of no concern to the police, can nevertheless be punished through civil money damages. For example, sexual harassment laws are rooted in Title VII, the fair employment provision of the Civil Rights Act of 1964, which provides civil penalties. Perhaps the first example of radical feminist use of the civil courts comes from the Minneapolis Anti-Pornography Ordinance of 1983, which would have given individual women or groups of women the right to sue producers or distributors of pornography for damages. (The ordinance was vetoed by the mayor.) Through such local measures, radical feminists have tried to equate pornography with discrimination on the basis of sex, thus bypassing First Amendment concerns.

The second advantage of the civil courts is that they are far less stringent than criminal ones. This factor is particularly important for crimes such as rape that are notoriously difficult to prove. In a criminal court the alleged victim must sustain her case beyond a reasonable doubt. Civil court requires only a preponderance of the evidence, which can mean as little as 51 percent certainty. Moreover, in civil court, the rules of evidence are more relaxed. Therefore, a rape case dismissed by a criminal court may well succeed in a civil action. In the matter of Brzonkala, the defendants did not even reach criminal court: a grand jury found insufficient evidence to indict. Nevertheless, VAWA allowed her to bring civil suit against them. In short, it allowed her to pursue a criminal case that was too weak to be admitted into criminal court.

Statutory Vagueness

Ominously, VAWA does not clearly delineate what constitutes "gender-motivated violence," allowing the term to cover conceivably any situation of abuse that involves sexual hostility. This is promising for feminists who routinely consider even words and images to be a form of sexual violence. Such logic led Supreme Court Justice Sandra Day O'Connor to state, "Your approach . . . would justify a federal remedy for alimony or child support." Arguably, that is precisely what radical feminists wanted and hoped to achieve through VAWA.

Such feminists want a war on "gender violence" similar to the War on Drugs—that is, zero tolerance backed by maximum force. To this end, VAWA attempts to create a special class of crime defined by ideology. A major tenet of radical feminism is that violence against women is part of a political campaign that men as a class inflict on women as a class. The fact that real violence against women—murder, battery, rape—has been steady and steeply declining since 1990 in no way affects their passionate cry for harsher enforcement. Facts are often irrelevant to ideology. In refus-

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ing to expand congressional power under the Commerce Clause, the Supreme Court decision inadvertently dealt an unexpected blow to this feminist agenda. It was unexpected because the Supreme Court tends to overturn rather than to uphold earlier rulings in the cases it hears. Moreover, Justice O'Connor has a strong track record of ruling in favor of "women's rights," yet she voted with the majority.

No wonder National Organization for Women (NOW) president Patricia Ireland felt betrayed. She declared, "The Supreme Court has said not *just* that women's right to be free from violence is not protected by the U.S. Constitution but that the Constitution actually prohibits Congress from providing such protection. I've never seen a more compelling argument for a constitutional amendment guaranteeing women's equality."

NOW further proclaimed, "The Rehnquist Court's ruling in *U.S. v. Morrison* is a setback for women's rights and a triumph for those that seek to roll back 30 years of federal civil rights law under the guise of states' rights. . . . For them, ending violence against women takes a back seat to preserving states' rights to deal with violence—or not deal with it at all."

Impact of *U.S. v. Morrison*

With the likes of NOW and Hillary Clinton calling for a restoration of VAWA, the issue is not likely to vanish from the political scene. But it is a mistake to view the Supreme Court decision as an attack on women in any manner. As Senator Joseph R. Biden, Jr., an advocate of VAWA, declared, "this decision is really all about power: who has the power, the court or Congress?"

The case was a victory for those who wish to limit congressional power. In rejecting VAWA, the U.S. Court of Appeals stated, "Such a statute . . . cannot be reconciled with the principles of limited federal government upon which this nation is founded." *Morrison* constitutes a stop sign in the recent political drive toward nationalizing selected crimes, a return to fundamental constitutional considerations and to the rule of law. William Mellor, president of the Institute for Justice, explained that the decision addressed "whether or not the Congress operates under enumerated and, therefore, limited powers; or whether it has authority to basically regulate any activity it sees fit."

The most loudly debated question surrounding the *Morrison* decision will be its impact on violence against women. Some have argued that VAWA's civil-rights remedy would not have benefited many women anyway. In cases of rape, for instance, the perpetrator rarely has real assets that can be attached in a judgment. Arguably, the real beneficiaries of VAWA would have been women who bring "deep pocket" defendants to court: for example, well-to-do women in divorce proceedings who might use the law as leverage, or women who have complaints against entities such as universities.

VAWA's greatest value to its proponents may be as an ideological symbol. It symbolizes and institutionalizes the political belief that women must receive special protection from men. When confronted with violence and its redress, VAWA said that women are not to be treated as individuals but are to be accorded privileges as the members of a class. Yet Curt Levey, an attorney for the Center for Individual Rights (CIR), which represented Antonio Morrison, commented that "although today's decision will be viewed as a historic setback for feminist advocacy groups, it is a victory for American women, whose safety is best preserved by strengthening local law enforcement, rather than by relying on federal bureaucrats."

The Supreme Court's decision was not a blow to women's equality or safety, which was not at issue. It was an attempt to check the seemingly infinite and unenumerated powers claimed by Congress. As Michael E. Rosman, CIR general counsel, put it, "The court is now requiring Congress to toe the constitutional line." □

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Harmful Tax Practices?

by David N. Laband

The Organization for Economic Cooperation and Development (OECD), a Paris-based group of 29 governments (including the U.S. government) is demonizing tax havens around the world. Consider this statement from a recent OECD report: "Harmful tax practices may exist when regimes are tailored to erode the tax base of other countries. This can occur when tax regimes attract investment or savings originating elsewhere and when they facilitate the avoidance of other countries' taxes."*

In June the OECD published a list of 35 tax havens, warning of sanctions a year from now if these countries fail to change their ways. A CNN.com story quoted from an OECD statement that these countries "are being given the opportunity over the next 12 months to determine whether or not they wish to work with the OECD to eliminate harmful features of their regime" and that "defensive measures" could be taken against places that chose not to conform with international tax standards.

The OECD Web site (see note) is particularly illuminating. Beneath the headline "Harmful Tax Practices" is written: "Globalisation and new electronic technologies can permit a proliferation of tax regimes designed to attract geographically mobile activities. Governments must take measures, in particular intensifying their international cooperation, to avoid the world-wide reduction in welfare caused by *tax-induced distortions in capital* and financial flows and to *protect their tax bases*" (emphasis added). Evidently, the OECD has a problem with tax competition: "If nothing is done, governments may increasingly be forced to engage in competitive tax bidding to attract or retain mobile activities. That 'race to the bottom', where location and financing decisions become primarily tax driven, will mean that capital and financial flows will be distorted and it will become more difficult to achieve fair competition for real economic activities."

Furthermore, the OECD warns that tax havens make collecting taxes on "mobile activities" difficult—creating serious consequences: "If spending is not reduced to make up for this revenue loss there is a real risk that taxes on labour, consumption and non-mobile activities will need to be increased. This shift will make tax systems less equitable and, by narrowing the tax base, will introduce further distortions. By increasing non-wage labour costs, it may also have a negative impact on employment. . . . The potential impact of these developments is significant."

OECD estimates that "foreign direct investment by G7 countries in a number of jurisdictions in the Caribbean and in the South Pacific island states, which are generally consid-

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*Organization for Economic Cooperation and Development, "Harmful Tax Practices," www.oecd.org/daf/fa/harm_tax/harmtax.htm#Report. According to the organization's Web site, the OECD "most importantly, provides governments a setting in which to discuss, develop and perfect economic and social policy."

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ered to be low-tax jurisdictions, increased more than five-fold over the period 1985–1994, to more than US$200billion."

Sounds bad, huh? Well, it *is* bad. Only the real problem is that the OECD is trying to kill a tried-and-true cure for the underlying problem of high taxes. Throughout recorded history, when taxes, social or religious policies, or other political conditions have become onerous, freedom-loving individuals have either fought to overthrow the oppression or fled to other locations where they were not so oppressed. Like the Pilgrims who fled religious persecution in England in favor of America, the oppressed vote with their feet. This clearly is welfare-enhancing for the formerly oppressed individuals, although likely welfare-reducing for the former oppressors. On net, it almost certainly is the case that social welfare is enhanced by voting with the feet; otherwise the oppressors would have been willing and able to strike a bargain with the oppressed to induce them not to leave.

Fleeing Oppression

Corporate raiders specialize in taking over mismanaged companies and finding better management. The raider is not the cause of the acquired company's problems; he is an entrepreneur who helps cure the underlying problem of mismanagement. Similarly, capital flight away from political mismanagement serves the same purpose. Whether the political mismanagement takes the form of direct seizure of real or financial assets or indirect seizure through high taxes or onerous regulation, capital flight sends an unmistakable message that individuals are oppressed. Labor flight serves the same purpose. The point is, the problem does not originate in the country where the owners of labor and capital settle; it originates rather in the country from which the owners of labor and capital fled.

Indeed, if the discussion were focused on the large-scale movement of politically or ethnically oppressed refugees from Rwanda to Uganda or from Kosovo to Montenegro, there likely would be strong agreement within OECD that the real problems lay in Rwanda and Kosovo, not in the safe havens of Uganda or Montenegro. The seeking of a safe haven is symptomatic of underlying pathology in the home country; it is not the pathology itself.

Not everyone who is oppressed can or will move. A variety of factors (family or social reasons, not easily transferable labor skills, immobile physical capital, religious beliefs) may make an individual immobile, despite political, religious, social or other oppression. It hardly seems efficient to preclude those who are willing and able to move on the grounds that there are others who are unable or unwilling to do so.

Yet that is exactly what the OECD argues for: "There is no reason why taxpayers that do not or cannot take advantage of harmful tax practices should have to pay the taxes avoided by those who have easy access to tax havens and harmful preferential tax regimes."

This position reflects only one possibility and one that likely misses the mark by a wide margin. Perhaps those left behind *should* pay the taxes avoided by those who have fled to tax havens. If one group of citizens is politically able to use the fiat power of the state to force everyone to pay taxes to fund projects valued highly only by members of that group but abhorred by everyone else, welfare is enhanced by increasing the taxes on the former and reducing taxes on the latter. Seeking tax havens is one way of accomplishing this result; eliminating tax havens in this context is welfare-reducing, not welfare-enhancing.

Back to the issue of causation: the problem here is not tax havens and not mobile capital. Tax havens do not create mobile capital. Rather, mobile capital (just like mobile labor) continuously seeks a better place to live. The real problem is high taxes and oppression. High taxes reduce the return to owners of capital and labor. The owners of both react predictably: by reducing the amount of capital and labor they supply. They do so either by converting their immobile capital to mobile capital and leaving the area entirely in favor of a location where the returns are higher, or by refusing to work (or to put their capital to work). Either way, the impact of high taxes is welfare-reducing. By implication, then, the impact of tax havens is unmistakably welfare-enhancing. The more capital (or labor) that

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flees to tax havens, the stronger the message sent to the politicians that taxes are too high. This is information that political leaders need to have in order to make fully informed decisions about tax policy. Full information is a sine qua non of efficient decision-making.

Key factors used by the OECD in identifying and assessing harmful preferential tax regimes include no or low effective tax rates, lack of transparency, and lack of effective exchange of information. It is ironic, if not hypocritical, that the OECD faults tax havens for their lack of "transparency" and lack of effective exchange of information while simultaneously doing its utmost to prevent an effective flow of information from taxpayers to politicians. Absent this information, taxes almost certainly will be too high.

The OECD policy initiative (Forum on Harmful Tax Practices) that is responsible for identifying and attacking tax havens does not promote welfare (although it claims to, of course). Rather, it is a mechanism designed to protect members of the OECD cartel. A reasonable person could infer the OECD's real intent from the previously highlighted quote from its Web site: countries need "to protect their tax bases." Enough said. □

Foundation for Economic Education Fall Dinner

Featuring

Dr. Charles Murray

Author of *Losing Ground* and *What It Means to Be a Libertarian*

Sunday, October 29, 2000

Harvard Club, New York, NY
Reception 6:00 P.M./Dinner 7:00 P.M.

For further information, please contact Nicole Gray at FEE, 914-591-7230, ngray@fee.org.

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Economics

Marginalism and the Morality of Pricing Human Lives

When I ask students in my large economics classes if some things are just too important to put a price on, someone always answers, "human life." This seems like a reasonable answer. After all, how many people would sacrifice their lives for cash, no matter how much was offered? What is the point of being a rich corpse? But economists reject the notion that human life is priceless. They put a price on human life, not because they are uncaring, callous, and completely lacking in moral sensitivity, but because they have a professional interest in understanding human action and because they understand that there is nothing morally lacking about pricing human life.

All of us put a price on our own lives every day with the choices we make and the actions we take. And pricing human life provides information that can save large numbers of lives, certainly not an immoral activity. Unfortunately, the moral superiority that so many people feel when expressing outrage at pricing human life helps keep in place government policies that cause many people to die needlessly.

Recognizing that prices reflect the marginal value of things is the key to understanding why economists put prices on human life. The price of asparagus gives us information on the value of one more pound of asparagus, not the value of the entire crop. Similarly, when economists talk about the price of human life, they are referring to the marginal value of life—the value of a slightly longer life expectancy—not the total value. The total value we put on our lives is extremely high (in most cases infinite), so we would not agree to be killed for any amount of money. Yet we put a very low marginal value on our lives. We routinely do things that reduce our life expectancy by marginal amounts in return for rather minor conveniences and pleasures. We often stay up too late, eat and drink too much, fail to get enough exercise, and drive too fast. When we do so, we are putting a price on our lives, and a pretty low price. Just how much is it worth to eat that extra cream puff or drink that extra beer? You would probably forgo the cream puff for $10, but not to avoid reducing your life expectancy by a marginal amount. If so, the implication is clear—the marginal value, or price, you place on your life is no more than $10.

The Risks of Government Policies to Reduce Risks

There is nothing wrong or irrational about putting a low marginal value on our lives. We face tradeoffs in everything we do, and living a meaningful and satisfying life requires doing things that reduce how long we can expect to live. It is sensible to avoid paying very much to avoid very small risks and the corresponding reductions in life expectancy.

In many situations we can choose how much to pay to avoid risks. We can choose to

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sacrifice time by slowing down a little, taking a somewhat less dangerous job that pays a little less, or buying a slip-resistant rubber mat for the bathtub (bathtubs are dangerous places). Government policy attempts to reduce many risks we face, but we have little choice in how much we pay for the risk reduction we receive. The justification for government action is that the risks are general, like the risks from pollution, and it would be difficult, if not impossible, for individuals to protect themselves acting alone. This is a reasonable justification for some risks, although it cannot be used for many government regulations, such as those requiring seat-belt use or outlawing smoking in all bars. But even when government action is justified, it doesn't make sense to enact regulations that make people pay more to reduce risks than the reduction is worth. Unfortunately, this is common practice.

According to many studies of how much people pay for safety devices and how much income they sacrifice to take safer jobs, they are willing to spend from $3 million to $7 million to save a life. Yet many government regulations impose a far greater cost per life saved. For example, Environmental Protection Agency (EPA) regulations on benzene storage are estimated to cost $260 million per life saved; EPA regulations on contaminated land disposal over $4.5 billion per life saved; and Occupational Safety and Health Administration (OSHA) regulations on formaldehyde over $92.7 billion per life saved.* The problem with the high regulatory cost of saving a life is not only that these costs are far higher than the amount individuals would pay, but that these regulations increase the number of lives lost.

Such costly policies may reduce some risks, but they also reduce wealth, and there is plenty of evidence of a positive relationship between wealth and life expectancy. Obviously healthy people are more productive and therefore wealthier. But cause and effect also goes the other way; studies show that costly policies, by reducing our wealth, also reduce life expectancy, with an estimated one life lost for every $10 million to $50 million in regulation costs. Using the $50 million estimate, this implies that saving one life with the formaldehyde regulation would cause the loss of over 1,854 lives due to reduced wealth.

Another problem with extremely costly regulations to reduce risk brings us back to the importance of *marginal* considerations. When the marginal cost of saving life is higher with one regulation than with another, it is possible to save more lives at the same cost by reducing the high-marginal-cost regulation and expanding the low-marginal-cost regulation. For example, if the EPA land-disposal regulation (which saves fewer than three lives) were scrapped, and just a small portion of the $4.5 billion in saving were used to expand low-marginal-cost-per-life-saved regulation, thousands of additional lives could be saved and there would be a net reduction in government regulation. In addition, by reducing costly regulations, more resources would be available for the creation of wealth and this would save even more lives.

By refusing to put a price on human life government regulators can justify regulations with extremely high costs for a life saved. Despite the superficial morality suggested by this "save-a-life-at-any-cost" approach to regulation, the result is more lives lost than if the marginal cost of saving lives were considered—if a price were put on human life—when we legislate and implement regulations. □

*The figures in this and subsequent paragraphs come from W. Kip Viscusi, "The Dangers of Unbounded Commitments to Regulate Risks," in Robert W. Hahn, ed., *Risks, Costs, and Lives Saved* (New York: Oxford University Press, 1996), pp. 135–66.

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IDEAS ON LIBERTY
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Patents and Monopoly Privilege

by Christopher Mayer

> "Discovery can give no right of ownership, for whatever is discovered must have been already here to be discovered. If a man makes a wheelbarrow, or a book, or a picture, he has a moral right to that particular wheelbarrow, or book, or picture, but no right to ask that others be prevented from making similar things. Such a prohibition, though given for the purpose of stimulating discovery and invention, really in the long run operates as a check upon them."
>
> —HENRY GEORGE
> *Progress and Poverty*

The role and scope of patents has recently emerged as a point of debate among pundits, legislators, and corporate executives. High-profile legal battles, such as those between Amazon.com and Barnes and Noble over one-click shopping and between Priceline.com and Microsoft over price-searching software, have drawn attention to the inadequacy of the current system of patent law.

Jeff Bezos, who is Amazon.com's chief executive, recently called for a revision in the patent protection afforded to software and Internet companies primarily by shortening the duration of patents to three to five years instead of the current 17-year term.

And beneath these more prominent companies, many smaller entrepreneurs and start-ups are beset with what they perceive as frivolous lawsuits regarding new software and business processes.

Former software executive and angel investor Peter Schaeffer has railed against "promiscuous patenting" and noted that "I have not seen any evidence that the Patent Office really understands software."[1]

Many cases could serve to illustrate Schaeffer's point. Two MIT professors filed a software patent infringement suit against AskJeeves. They allege that the Internet search engine company's "natural language queries," which conduct searches based on questions in plain English, violate their patent. They are seeking royalty payments and an order to prevent AskJeeves from selling or using natural-language–based tools.[2]

This case has yet to be decided and the legal experts who have commented on it say that the professors won't win. However, many cases have been successful so far. In December 1999, a federal court granted Amazon a temporary injunction against b&n.com (Barnes and Noble) for "one click" online shopping. In another recent case, Stac Elec-

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tronics won a $120 million suit against Microsoft. The threat of patent litigation is quickly becoming a big problem for many technology companies.

"Promiscuous patenting" is not new. In the 1970s, SCM Corporation brought a suit against Xerox Corporation charging that the company was maintaining a "patent thicket" of sleeping patents to pre-empt rivals. The court acknowledged Xerox's success in building a web of patents to deter rivals, but nonetheless ruled that SCM was not entitled to any damages because Xerox's patents were obtained legally.

While not new, the problem will only get more serious in the so-called New Economy. According to the U.S. Department of Commerce, the number of new patents issued annually nearly doubled from 60,000 per year to over 110,000 per year from 1970 to 1992. And yet, by the department's own research, just over 6,000 new products were introduced annually. This points to the fact that many patents go unused or are employed as sleeping patents to deter potential new rivals.

Rothbard's Critique

The late Murray Rothbard provided free-market advocates with a systematic critique of the patent system that gives many answers and points to a way out of the current confusion. The analysis, which is presented in his treatise, *Man, Economy, and State,* is the source of the Rothbard quotations below and the basis for this discussion.[3]

Nearly everyone seems to want to treat patents and copyrights in the same way. Two notable exceptions are Rothbard and Henry George. As Rothbard acknowledged, both a patent and a copyright are exclusive property rights and both protect innovations. However, legal enforcement of the two differs. As Rothbard wrote, "The crucial difference is that copyright is a logical attribute of property right on the free market, while patent is a monopoly invasion of that right."

In a copyright infringement suit the plaintiff must show that the defendant had access to and reproduced the work in violation of his contract with the seller. In other words, independent discoverers are not penalized and copyright infringement is not ruled in cases where similar works were produced independently. In this way, copyright infringement is implicit theft.

As Henry George wrote, "The copyright is not a right to the exclusive use of a fact, an idea, or a combination. . . . It does not prevent anyone from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only using the identical form of a particular book." For George, then, a copyright rests on "the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of any one else to do likewise."

A producer marks his work "copyright" and, as a condition of sale, the buyer agrees not to reproduce the work. This is part of a basic right of freedom of contract and would be supported in a free market. Rothbard's "acid test" for any policy or law was: "Is the outlawed practice implicit or explicit theft? If it is, then the free market would outlaw it; if not, then its outlawry is itself government interference in the free market."

While copyright has its basis in the prohibition of implicit theft, the patent has no such basis and is thus completely different in its enforcement.

As Rothbard notes, the patent is an exclusive grant of monopoly privilege for the first inventor. Any subsequent inventors, no matter how unaware they were of the first inventor's efforts, are debarred by violence from using their invention.

Henry George, in comparing the patent and copyright, wrote, "The patent, on the other hand, prohibits any one from doing a similar thing, and involves, usually for a specified time, an interference with the equal liberty on which the right of ownership rests. . . . It prohibits others from doing what has already been attempted."

Encouraging Innovation

The patent is defended usually on grounds that it encourages innovation and that without it, the incentive to incur the cost and

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risk of inventions would be diminished.

To say the patent is needed because it encourages innovation is to implicitly assume that the free market is not innovative enough. This is an arbitrary belief, and patent defenders who espouse such a view are asserting their own arbitrary preferences. The free market has its own rational test for any new undertaking, indeed, for allocations of all kinds: present against future, between different branches of production, between different goods, and even between research expenditures and other forms of investment. Profits and losses guide entrepreneurs to serve consumers according to consumer preferences, as expressed in their buying and abstention from buying.

Criticism of the pattern of production that emerges from the expressed preferences of consumers is, then, arbitrary. In a free market, of course, those who believe that there is not enough innovation are free to invest funds for this purpose or to undertake research programs of their own. However, to force a distinct pattern of production through the use of patents is a violation of property rights.

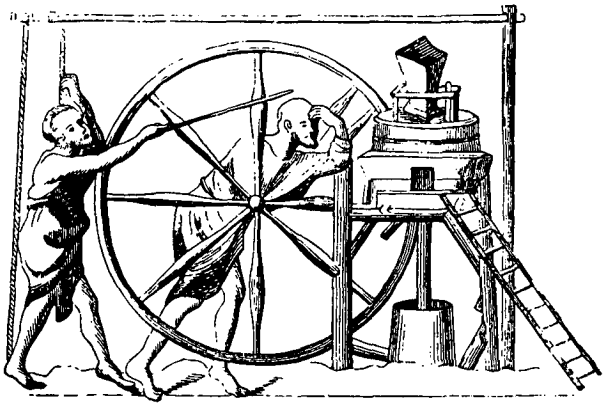
Second, without the existence of patents, the incentive to innovate in patentable technologies would be diminished. But understand that with the existence of patents resources are artificially diverted from their most economical use, again as expressed by the buying public. As Rothbard wrote, "Coercively to encourage research expenditures would distort and hamper the satisfaction of consumers and producers on the market." Since resources are scarce, this artificial stimulation of patentable research comes at the expense of those technologies that are not patentable.

The proper free-market policy is to extend copyright protection to inventors of machines, processes, and the like and to eliminate the whole body of patent law. Inventors could mark their creations "copyright," serving notice that anyone who buys the machine buys it on the condition that it will not be reproduced and sold. As Rothbard wrote, "The patent is incompatible with the free market *precisely to the extent that it goes beyond the copyright.*"

The copyright would be perpetual and would pass to the inventor's heirs and assigns. Anything else would be a violation of the basic property right of ownership. Rothbard wrote, "If the State decrees that a man's property ceases at a certain date, this means that the *State* is the real owner and that it simply grants the man use of the property for a certain period of time."

Independent inventors ought to be allowed to use and sell their invention, whether or not someone else has the protection of the government patent office. To prohibit that is to violate the property rights of independent discoverers. □

1. Dan Egbert, "Patents: The New Threat to Entrepreneurs?" in *Washington Techway*, March 13, 2000.
2. Ibid.
3. Murray N. Rothbard, *Man, Economy, and State* (Los Angeles: Nash Publishing, 1970 [1962]), pp. 652–60.



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IDEAS ON LIBERTY
OCTOBER 2000

Quartering Species

by Andrew P. Morriss and Richard L. Stroup

Most Americans seldom think about the Third Amendment. Relegated by most scholars and courts to footnotes and history books, the Third Amendment states, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The federal government pays for quartering soldiers, and military bases are highly sought after political prizes, not the subject of popular discontent.

That wasn't always the case, however. All during the colonial period Americans resisted British military authorities' attempts to quarter soldiers on individuals' property without compensation. That experience led to the Third Amendment's inclusion in the Bill of Rights and in numerous state constitutions as well.

The federal government may no longer involuntarily quarter troops but it is still attempting to use private property to "quarter" living creatures. Under the Endangered Species Act (ESA), the federal government routinely forces private property owners to bear the cost of supporting those species officially listed as "endangered." Those costs can be substantial—many species require large areas of undisturbed land around their nests and dens, for example, effectively ending the ability to develop or otherwise use land.

What's the connection with the Third Amendment? We started wondering what would happen if we took one of the left's favorite constitutional legal theories seriously and applied former Supreme Court Justice William Brennan's "living constitution" theory to the Third Amendment. Could ESA pass constitutional muster?

Unlike some of the other parts of the Constitution, the Third Amendment's language appears to be straightforward with a plain and obvious meaning: The Founders did not want soldiers put into people's houses in peacetime without the homeowner's consent or during wartime without due process. But this is no bar to a "living constitution" approach. Be forewarned—the "living constitution" is not for the faint of heart. And, we hasten to add, we don't think it is a legitimate mode of constitutional interpretation. But what if the same courts that found nude dancing to be speech had to apply their theories of interpretation to the Third Amendment? In an article appearing this fall in *Environmental Law*, a leading environmental law review, we argue that if the Constitution forbids the government to quarter soldiers in private homes, then it forbids it also to require people to quarter birds, rats, or grizzly bears simply because they are endangered.[1]

Our law review essay in part poked fun at the "living constitution" interpretations continually being offered to "update" the Consti-

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tution. Our essay was partly tongue-in-cheek, but the question is sensible: If it is wrong—legally and morally—for a person to be commanded to provide a home for a soldier, why should he or she be commanded to offer food and lodging to animals? Here we outline the legitimate comparison (minus the legalistic debate over how expansively to interpret provisions of the Constitution). We begin with a bit of history.

French and Indian Wars

Quartering problems in colonial America became serious in 1754 and 1755 because the French and Indian Wars caused additional British troop movements. American inns were small, and Americans objected to quartering. They resented sharing their homes with often rude and boorish strangers—at their own expense and at the sole discretion of the British military authorities. Some colonies enacted specific bans on quartering.

Now consider the Endangered Species Act, enacted by Congress in 1973. A sweeping piece of command-and-control legislation, it dictates that species listed as "endangered" or "threatened" will be granted extraordinary levels of protection from human beings. The Congressional Research Service labeled ESA "one of this country's most important and powerful environmental laws."[2] Habitat destruction, after all, is serious. Habitat destruction and degradation are by far the leading threats to biodiversity, contributing to the endangerment of at least 88 percent of the plants and animals on the endangered species list.[3] Under ESA, more than 1,200 species are now listed as "endangered" or "threatened," resulting in use restrictions on millions of acres of public and private land because of their presence.[4]

The success of ESA in actually saving species, however, is questionable at best. By May 1998, 34 species out of 1,138 listed had made it off the endangered and threatened lists. But of those, five were de-listed owing to their extinction, four had been removed because their listing had been due to taxonomic error, ten more were listed due to data error, and several others, arguably, had recovered for reasons other than ESA.[5]

ESA's failure is not due to a lack of funding. In 1993, for example, more than $500 million federal dollars were spent on endangered species protections; the figure has been rapidly rising.[6] States, too, bear substantial costs, running in some cases into the tens of millions of dollars per year. Far more is spent by private sources across the nation. Indeed, the power of ESA comes from its ability to use private property without compensation. And therein lies the problem.

The ESA process today gives biologists of the Fish and Wildlife Service (FWS) veto power over any use of land, public or private, that they consider potentially important as home to a listed species. FWS biologists decide whether land can be used for logging, farming, or building. They become, in important respects, the land's managers. They need not consider the value of the alternative uses of the land.

Land is not, however, free, even when government bureaucrats treat it that way. As a result, government land managers will allocate "too much" land to habitat protection. There are three reasons for that:

First, a zero price is artificially low relative to the cost of other methods, such as active land management, that can add to land's ability to support the species in question; so too much land is used;

Second, the decision-maker has no reason to economize on the true cost of the land inputs by, for example, using a bid process to find low-cost providers of land services; so the wrong land is used; and

Third, the total money cost to the decision-maker for each project is far less than the project's true cost to society; so voters and politicians never face the true cost of what the regulations demand.

The actions required of landowners by the FWS are high cost and land-intensive because land use is free to the agency. It fails to take even simple steps to increase the productivity of habitat because, while restrictions placed on land are "free" to the FWS, other simple steps are not, even when those steps cost little and work well. They cannot force a landowner to place an inexpensive nest box in a tree under ESA's authority, but they can limit land

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use on many acres around a nest. Ironically, the past century gives many examples, such as bluebirds and waterfowl, where without ESA hanging over their heads, many landowners were happy to allow enthusiasts to place nest boxes for threatened species. Under ESA, however, landowners are almost surely punished by restrictions brought on by the species' presence. They are now reluctant to allow any such action that would attract a listed species. As a result, habitat protection is made far more costly to society than it needs to be. Over time, this can lead to too little habitat protection, as voters come to sense the high cost to people of such projects—even though much of the cost is off-budget.

Even more important for species protection, treating land use as free creates perverse incentives for landowners to pre-emptively destroy habitat, since the presence of a designated or "listed" endangered species is an economic liability. And animal species, unlike British soldiers, can often be kept away by simple land-management techniques. The actions of the FWS, if not those of the protected animal, have become feared and unwelcome. The logic is clear. ESA gives private landowners an incentive to manage their land to keep away listed species. Many do just that. Examples are plentiful in the news media, but there is statistical evidence also.

Economists Dean Lueck and Jeffrey Michael examined how the presence of the red-cockaded woodpecker affected timber harvest rates and the age of harvests in North Carolina.[7] Using data from the U.S. Forest Service's Forest Inventory and Analysis and a 1997–98 North Carolina State University survey of over 400 landowners, and sophisticated econometric techniques, Lueck and Michael found statistically significant evidence that "increases in the proximity of a plot to [woodpeckers] increases the probability that the plot will be harvested and decreases the age at which the forest is harvested."

Involuntary Host

Now let us return to our theme: Is requiring a landowner to host an endangered species on his land "quartering" within the meaning of our interpretation of the Third Amendment?

Americans objected to the involuntary quartering of soldiers on their property for several reasons: Property owners lost the use of the part of the property the soldiers physically occupied; they lost privacy in other areas of their homes; they also had to deal with problems from the behavior of the soldiers and their visitors on the premises, losses from the increased wear and tear created by the soldiers' presence, and losses from the need to deal with the British military on numerous small problems that arose while the soldiers were quartered.

ESA imposes similar costs on property owners, who must deal with government regulators concerning the use of their land. Property owners have even been forbidden to build new homes or protect existing homes on or near property where endangered species have been located.

The original Third Amendment ended the quartering problem by putting it on budget and making it voluntary. Local enthusiasm for soldiers now is so great that we have too many domestic military establishments, not too few. The same respect for property rights and the market process that allows voluntary quartering of soldiers and minimizes the cost to all of doing so would work for animals as well. Species, landowners, and constitutional government would be the worthy winners. □

1. Anyone interested in a copy of the article should contact Morriss at apm5@po.cwru.edu. The article provides extensive references on the "living constitution" theory, the history of the Third Amendment, and the ESA.

2. M. Lynne Corn, *Endangered Species Act Issues* (Congressional Research Service, May 27, 1992), p. 1.

3. David S. Wilcove, "The Promise and the Disappointment of the Endangered Species Act," *New York University Environmental Law Journal* 6, 1998, pp. 275, 277–78.

4. U.S. Fish and Wildlife Service data from http://endangered.fws.gov/boxscore.html ("last updated Nov. 30, 1999").

5. A report on the species that had been delisted is the National Wilderness Institute's "Babbitt's Big Mistake," released in July 1998 and available at http://www.nwi.org/SpecialStudies/BabbittReport/Overview.html.

6. Robert E. Gordon, Jr., James K. Lacy, and James R. Streeter, "Conservation Under the Endangered Species Act," *Environment International* 23, 1997, pp. 359, 400.

7. Dean Lueck and Jeffrey Michael, "Preemptive Habitat Destruction Under the Endangered Species Act," Working Paper, Montana State University.

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CAPITAL LETTERS

Selective Taxation Worse

To the Editor:

Lawrence Reed argues against taxation of Internet sales in his recent article "Don't Tax the Internet" (June 2000). There is an evil worse than excessive taxation: that of selective taxation. . . . Exemption of Internet-originated sales from taxation, while still allowing taxation of phone-originated sales taxes, amounts to a form of discrimination. Indeed, arguments in Congress for the *temporary* moratorium on Internet sales taxes always talk about trying to support the nascent industry.

A better solution is to allow jurisdictions to levy sales taxes based on the source point of the sale (rather than the destination). This would encourage competition between taxing entities as merchants move from high-tax states to low-tax states in order to offer best prices to consumers.

—JOHN SHELTON
Redwood City, California

Lawrence Reed replies:

Mr. Shelton is right that "selective taxation" is bad because it involves government's creating an unlevel playing field by picking winners and losers and bestowing discriminatory special privileges. But it's important to remember that government indirectly taxes some Internet purchases already (those made through dial-up connections) via the taxes it imposes on telephone service. Also, Internet firms do pay all relevant taxes in the respective states where each is physically located, just like other companies.

One could argue that allowing jurisdictions to levy sales taxes based on the source of the sale rather than the product's destination would be the fairest solution, but that would require the five states that do not currently levy a sales tax to begin doing so.

If the moratorium on new Internet taxes serves to restrain increases in existing sales taxes or even to spur reductions, then we all will benefit.

Defending the Rich

To the Editor:

"In Defense of the Rich" by Mark Skousen (June 2000) is not only an amoral defense of the rich, it is much more sinister than that: It is an immoral defense of the rich. In the article, Dr. Skousen discusses the auxiliary benefits that the rich provide society, as well as some of the moral attributes and undertakings of some rich people. No argument could be made that is more harmful to capitalism, and no argument could more effectively deliver up the rich to their attackers than the one offered in this article.

The only proper defense of the rich is a moral one. In a free society, the people who own a large sum of wealth created it by means of their own toil, and this is why they are entitled to it. The wealth that they created is their own, regardless of whether this is good for the economy, and regardless of what the people who own it spend it on. The argument that is used in the article is in defense of the latter two issues instead of the primary one. This is an egregious error because it abdicates the moral argument. . . . As long as the majority of people think that all wealth is created and owned by society, then an attempt to persuade people in favor of the rich is doomed. Just imagine the implications of such an idea: if society owns the wealth, then it is by the grace of society that any person can own property. An attempt to persuade people that it is better for them not to confiscate the property of the rich and to wait patiently for whatever crumbs the rich people drop their way will convince only a very few people. The implicit argument

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of the article is as follows: "The rich are good citizens. They pay their taxes, they give to charity, and they have families. And since they create opportunities for the rest of us, let us as a society decide to let them keep their money." Not only will this fail, but it is immoral because using this type of argument strips the rich of the proper moral defense that is necessary for people to understand if they are ever going to be convinced that capitalism is a just system.

Just as it is in every other aspect of capitalism, it is interesting and useful to examine the reasons it is actually better for the people "as a whole" if they are secure in their property. But the positive attributes of capitalism should not be used as its defense for the reasons stated above. By titling his article "In Defense of the Rich" and then leaving out the moral, i.e., proper, defense of the rich, Dr. Skousen is promoting the downfall of that which he claims to be defending. . . . That having been said, the information contained in the article is interesting to read, but any future attempt to defend any aspect of capitalism needs to include the moral argument.

—NICHOLAS A. CUROTT
Colorado Springs, Colorado

Mark Skousen replies:

Nicholas Curott protesteth too much. I agree wholeheartedly with his moral defense of property. Everyone, rich or poor, has a right to his own wealth—to spend, invest, or even waste it as he pleases. The state has no right to tax or confiscate his property without his permission, no matter how egregious his behavior. I did not think such an elementary principle needed to be explained to readers of *Ideas on Liberty*.

But amoral? Give me a break. If anything, my article is all about high moral standards and how the rich have a responsibility to make money honestly and to spend it wisely. Otherwise, politicians and the media will continue to bash the rich and promote high marginal tax rates and anti-rich policies. My purpose was to debunk a long-standing myth held by the public and the media—that the rich are profligate pigs, womanizers, and "robber barons" who engage in "conspicuous consumption." I wished to dispel the Marxist view that "behind every great fortune is a great crime." Early critics such as Thorstein Veblen, Matthew Josephson, and Sinclair Lewis portrayed the wealthy as robber barons who smoked $100 bills, built 25-room mansions, and abandoned their families in favor of trophy wives and frivolous activities. This negative image was far from harmless. It created an age of envy and censure—and inevitably high income-tax and estate-tax rates, and attacks on big business.

My purpose in writing my column was to alert the readers to the growing evidence favoring a better image for the rich and for capitalism, and to diffuse the anti-capitalist agenda of the politicians and the media. Recent evidence from Professor Thomas Stanley and others confirms an unusual statement made by Nassau Senior, the first professor of political economy, who said in his inaugural address at Oxford in 1825, "the pursuit of wealth . . . is, to the mass of mankind, the great source of moral improvement." Finally, in the year 2000, Professor Senior's statement is coming true.

This is all good news, and we need to spread the word rather than to accentuate some extreme laissez-faire tenet. If indeed the wealthy are today more actively pursuing the old-fashioned virtues of frugality, modesty, and faithfulness, then the public and our legislators need to know it. They are less likely to attack the rich and engage in anti-capitalist policies. They may even encourage wealth accumulation. I'm happy to report, by the way, that my column has been reprinted around the country and been translated recently into Spanish and published in several Latin American newspapers.

We will print the most interesting and provocative letters we receive regarding *Ideas on Liberty* articles and the issues they raise. Brevity is encouraged; longer letters may be edited because of space limitations. Address your letters to: *Ideas on Liberty*, FEE, 30 S. Broadway, Irvington-on-Hudson, NY 10533; e-mail: iol@fee.org; fax: 914-591-8910.

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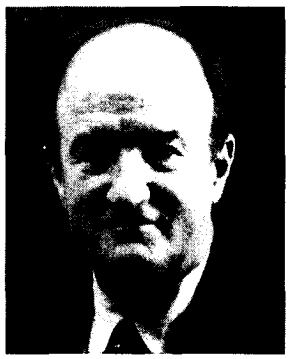
IDEAS ON LIBERTY
OCTOBER 2000



Having Their Cake

"The duty of 'saving' became nine-tenths of virtue and the growth of the cake the object of true religion."
—JOHN MAYNARD KEYNES[1]

In his 1920 bestseller, *The Economic Consequences of the Peace*, John Maynard Keynes made a profound observation about the success of capitalism before the Great War. He lauded "the immense accumulations of fixed capital" built up by the "new rich" during the half century before the war and compared the huge capital investment of this golden era to a "cake," noting how "vital" it was that the cake "never be consumed," but continue to "grow."

Keynes was intensely optimistic about the prospects of humanity, "if only the cake were not cut but was allowed to grow in the geometrical proportion predicted by Malthus for population." Rapid capital accumulation would result in the elimination of "overwork, overcrowding, and underfeeding," and workingmen "could proceed to the nobler exercises of their faculties."

Alas, it was not to be. The First World War destroyed Keynes's dream of universal progress. The cake was consumed. "The war has disclosed the possibility of consumption to all and the vanity of abstinence to many."[2]

War isn't the only enemy of capital accumulation. Since World War II, the greatest threat to capital formation (the growth of the cake) has been the direct and indirect taxation of capital.

Take, for example, the federal estate tax. The estate tax is often viewed as an "inheritance" tax and even a "death" tax. But it's much worse than that. It's also a tax on capital. An estate's taxable property includes stocks, bonds, business assets, real estate, coins and collectibles—all after-tax, after-consumption investments.

If your net worth exceeds $675,000, your heirs will be forced to pay at least 18 percent to the IRS. The tax rate hits a confiscatory 55 percent at a mere taxable estate of $3 million.

Capital is the lifeblood of the economy. Capital investment finances new technology, new production processes, quality improvements, jobs, and economic growth in general. When those investment funds are taxed—$28 billion in 1998—the funds are removed from the investment pool and transferred to Washington, where they are consumed. For the most part the funds are consumed through government expenditures and "transfer payments" (welfare, salaries of government workers, and so on).

The estate tax also creates economic distor-

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tions. It encourages individuals to engage in "estate planning," expensive legal exercises to avoid the death tax. It forces individuals to buy insurance policies they would not otherwise buy and create tax-exempt trusts and foundations that they would not ordinarily create. Undoubtedly, millions of funds are transferred every year into foundations and charities just to avoid estate taxes. Charitable giving and public foundations have become big business, but what is the price? Mismanagement and waste are common features in these nonbusiness organizations.

Another Inefficient Tax: Capital Gains Taxes

Perhaps an even more sinister tax is the capital gains tax. If you sell an asset (stock, bond, commodity, real estate, or collectible), the profits are taxed between 20 and 40 percent, depending on how long you held the asset. (If you hold for more than a year, the maximum rate is 20 percent.) This is a terrible penalty on capital. It means that every time a stock or other asset is traded outside a tax-exempt vehicle, 20 to 40 percent of the profits are removed from the private economy and sent to Washington, never to be invested again. With the recent bull market on Wall Street, annual capital gains taxes have exceeded $100 billion. What a terrible drain on the economy.

Capital gains taxes also result in economic inefficiency. Because of the high tax on capital gains, many investors refuse to sell their assets. They may prefer to switch into a potentially more profitable investment, but they stay with their original investment because they hate the idea of paying Uncle Sam. Clearly, capital would be more efficiently allocated to its more productive use without this burdensome profits tax.

The United States can learn a lot from foreign nations. Hong Kong has a flat 15 percent personal income tax, a 16.5 percent corporate income tax, and no tax at all on capital gains. In fact, most of the New Industrial Countries in Southeast Asia do not tax capital gains. Thus capital can move freely throughout Hong Kong and around the world without distortion. And the cake has grown rapidly because of capital's tax-free status. Hong Kong does have an estate tax on values exceeding HK$7 million, but the maximum rate is only 18 percent.[3]

Fortunately, the U.S. government has recently recognized the negative drain these taxes have on the economy. It has reduced long-term capital gains, and Congress has even entertained a bill to abolish federal estate taxes altogether.

Eliminating taxes on estates and capital gains has been criticized as a break for the rich. Moreover, critics say, estate taxes should be kept in order to establish a level playing field. They argue, "Children and grandchildren of wealthy people didn't earn inherited money. They should have to work for it, just as their parents did. Inheritances create disincentives to work."

But these critics fail to understand the broader implications of a large tax-free estate and tax-free capital gains. Everyone—not just the rich—benefits from eliminating these taxes because wealthy people's capital would be left intact, invested in the stock market, businesses, farms, banks, insurance companies, real estate, and other capital assets, thus insuring strong economic growth and a high standard of living for everyone. As Ludwig von Mises once stated, "Do they realize that every measure leading to capital decumulation jeopardizes their prosperity?"[4]

As an investment adviser, I share the concern that unrestricted inheritances to children or grandchildren can be morally corrupting, but there are other solutions besides a confiscatory tax. For example, a will can limit the use of inherited funds until a certain age of responsibility is reached, or a trust can offer matching funds as a way to encourage work and responsibility. □

1. John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace, 1920), p. 20.

2. Ibid., pp. 20–21.

3. For an excellent summary of tax policies throughout the world, see *International Tax Summaries*, published annually by Coopers & Lybrand (New York: John Wiley & Sons).

4. Ludwig von Mises, *Planning for Freedom*, 4th ed. (South Holland, Ill.: Libertarian Press, 1980), p. 208.

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BOOKS

The Power to Destroy

by William V. Roth and William H. Nixon

The Atlantic Monthly Press • 1999 • 290 pages • $23.00

Reviewed by John Attarian

The Internal Revenue Service penalizes a taxpayer $46,806 for an alleged underpayment of ten cents. Armed IRS agents storm the homes of a restaurant owner and his manager because of unsubstantiated charges from a fired ex-employee that the men were drug dealers. A taxpayer is driven to suicide by the IRS's hounding after it had disallowed business losses he had claimed ten years earlier.

Those are some of the horror stories told in this powerful book by Senator William Roth of Delaware, co-author of the 1981 Kemp-Roth tax cut, and his executive assistant, William Nixon. They wrote *The Power to Destroy* in the belief that "real change will take place within the IRS only when Americans are fully aware of how the agency works and possess the knowledge necessary to protect themselves." The best protection against the IRS would be its non-existence. Although Roth and Nixon are not aiming for that ultimate objective, their book, by showing the IRS's fangs in all their viciousness, may help to catalyze a true tax rebellion.

As the most powerful agency in America the IRS cuts a huge swath through our lives. Property seizures have increased 400 percent since 1980 and every day 300,000 households receive IRS demands for more information or notifications of audits. As chairman of the Senate Finance Committee, Roth is one of the two members of Congress empowered to conduct a full-scale investigation of the IRS. (The other is the chairman of the House Ways and Means Committee.) In 1996, as evidence of abuses mounted, Roth decided to undertake the first thorough investigation of the IRS in history. The book mostly reports on the findings of his committee.

The authors do not say that the IRS is staffed exclusively with abusive people who thrive on power—although there are some—but rather that the culture of the IRS drives its employees to treat taxpayers as exploitable resources. Within the IRS, incentives push agents to try to wring all they can out of taxpayers. As Roth and Nixon write, "despite laws against the practice, goals and quotas still drive the performance of auditors, groups, divisions and even districts." Career advancement hinges on how much revenue one can bring in, how many cases one can close, and so on. Therefore agents can and do take advantage of the indecipherability of the tax code and the natural fear most people have of the IRS. Moreover, IRS training encourages employees to "see taxpayers as liars and cheaters" who are guilty until proven innocent.

That mindset produces several consequences, including padded tax liabilities and penalties and use of Bureau of Labor Statistics data to impute income through agency-generated "substitute returns" (when an agent believes that a nonfiler should have filed) or to inflate income to the level the agent thinks is "right." And of course some agents are quick to resort to brutal property seizures, liens, and levies to collect money, and plain threats and harassment.

Small businesses are favorite targets. Like any predator, the IRS likes to go after those who are least able to fight back. Large companies can afford high-priced legal counsel that can argue relentlessly over the interpretation of the tax code; small ones usually can't, and tend to cave in under an IRS onslaught. Many small businesses have been driven to bankruptcy by the IRS.

Roth and Nixon point out that Congress is partly to blame for this terrible state of affairs. Frequent changes in the tax laws have spawned a nightmarishly complicated tax code, creating difficulties for taxpayers. Thus the authors argue, modestly, for a far simpler tax code.

The Internal Revenue Service Restructuring and Reform Act of 1998, enacted follow-

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ing Senator Roth's hearings, was designed to curb the abuse of taxpayers, such as shifting the burden of proof from the taxpayer to the IRS in some circumstances and restricting the use of liens and property seizures. Nevertheless Congress, with its spending addiction, likes the extra revenues that IRS zeal produces.

Get this revealing book, read it, and pass it on. The tax nightmare you prevent may be your own. □

John Attarian is a freelance writer in Ann Arbor, Michigan. He has recently completed a book on Social Security.

The Nazi War on Cancer

by Robert N. Proctor

Princeton University Press • 1999 • 380 pages • $29.95

Reviewed by Miguel A. Faria, Jr.

This is a deeply disturbing book for it describes in a good light what the author calls "the lesser-known 'flipside' of fascism—the side that gave us struggles against smoking, campaigns for cleaner food and water, for exercise and preventive medicine."

The Nazi "accomplishments" include the establishment of medical registries (that is, databases) and medical surveillance, both later used for "euthanasia," and the linkage of occupational diseases and cancer to environmental poisons. The author, professor of history of science at Penn State, also details how Nazi scientists were the first investigators to link and ultimately prove with elegant epidemiological studies that cigarette smoking causes lung cancer.

Armed with scientific proof, Nazi officials moved aggressively in an all-out campaign against cigarette smoking, and tobacco was proclaimed "an enemy of the people" (*Volksfeind*). As the author states early in his prologue: "The participation of doctors in Nazi racial crimes is disturbing, but it is equally disturbing that Nazi doctors and public health activists were also involved in what we today might regard as 'progressive' or even socially responsible [programs]." But what disturbs Proctor is that he is uncomfortable in the company of some of history's foremost butchers, for he shares with them the view that it is permissible to use state power for the advance of "public health."

Proctor points out German physicians and scientists produced genuine medical research, not only during the Nazi era, but long before that. Through much of the nineteenth and twentieth centuries, Germany led the world in scientific achievements, particularly medical research. Nevertheless, those accomplishments must be viewed within their ethical, moral, and historical context. Proctor writes almost dispassionately and always objectively, as the science historian he is. Unfortunately, this book lacks the perspective of a medical ethicist. As a neurosurgeon with a background in medical history and a more than passing interest in medical ethics, I don't see the Nazi "achievements" in the same positive light that the author does.

The subject of "bioethics" and "medical ethics" and their long-term consequences to German society (or for that matter ours) are not broached in this book until the very end, and then the author's discussion is contained within only two pages. He even reproaches medical ethicists when he adds: "Bioethical discussions are full of facile identifications of Nazism with everything from abortion and rationalized medicine to doctor-assisted suicide." That is, Proctor declines to discuss the ethics of the Nazi war on cancer because he dislikes the fact that some medical ethicists have gone too far in linking practices and policies they abhor with Nazism.

I side with the medical ethicists and with those souls, not all of them libertarians as the author implies, who are troubled by further government efforts in our country to protect us from ourselves—for the good of "society"—at the expense of our autonomy and liberties. In Proctor's utilitarian calculus, freedom evidently counts for nothing. It counted for nothing to the Nazis, too.

Consider that the Nazis themselves declared that occupational medicine, one of the disciplines dear to their hearts, was to make a "worker who would remain productive

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until retirement and then pass away shortly thereafter." The aim of the Nazis was "to reduce the difference between the age of retirement and the age of death ideally to zero." And those were the lucky ones—the members of the master race. For the rest of the expendable "undermen" there was slavery, ghastly medical experimentation, and death in the abominable concentration camps.

There is danger in the unholy partnership of the medical profession and government planners, namely the perversion and subversion of the medical sciences and public health for the new collectivist ethics of population-based medicine. Once medical professionals ally with the state and abandon the individual-based ethics of Hippocrates in favor of the collective good, or as the Nazis put it, "the health of the nation," the stage is set for a terrible drama.

Parallels must be drawn with our present situation, as much as the author wants to avoid it. In the areas of public health, the politicization of AIDS policy, mandatory vaccine programs, biased research on guns (and its publication in medical journals), and so on, the U.S. government is following the Nazi precedent by casting aside our cherished concepts of individualism in a quixotic crusade for "the common good."

I strongly recommend this book, particularly to history buffs and those interested in the perpetual struggle between the individual and the state. Its history is immensely valuable, even if the author fails to draw the right conclusions. □

Miguel Faria, M.D., is editor-in-chief of the Medical Sentinel, *published by the Association of American Physicians and Surgeons (AAPS), and author of* Vandals at the Gates of Medicine: Historic Perspective on the Battle Over Health Care Reform *and* Medical Warrior: Fighting Corporate Socialized Medicine.

The Fall and Rise of Freedom of Contract

edited by F. H. Buckley

Duke University Press • 1999 • 461 pages • $65.95

Reviewed by George C. Leef

This is a book about a turning of the tide. The tide in question is the intellectually important question of how society will treat contracts. Once a pillar of the common law and a cornerstone of the American legal system, by the 1970s the idea that people should be free to contract as they choose was rapidly giving way to legal theories that call for governmental interference with contractual freedom in many circumstances. Egalitarian sentiment had invaded the law schools and then the courtrooms, giving judges and juries considerable latitude to undo or rewrite contracts where they felt that the parties had "unequal bargaining power," "unequal access to information," or for other reasons. An influential book proclaimed *The Rise and Fall of Freedom of Contract.*

But a funny thing happened on the way to the demise of freedom of contract—its defenders arose to rescue it from oblivion. Over the last three decades, law and economics scholars have staged an intellectual counterattack showing from many different angles the superiority of freedom of contract and the counterproductivity of governmental interference. In *The Fall and Rise of Freedom of Contract*, F. H. Buckley, a professor at the George Mason University Law School, discusses the rescue operation. The book is a collection of papers given at a series of colloquia at the George Mason University Law and Economics Center and brings together some of the sharpest thinkers in the field.

The attack on freedom of contract was rooted in the same mundane intellectual errors that plague us in so many ways. The critics overestimated the problems associated with freedom and underestimated (or entirely ignored) the costs of interference with freedom. As Buckley observes, "Consumers are not as helpless as they were made out to be; and intrusive legal rules designed to protect

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them not infrequently left them worse off." But legal theorists, like politicians, enjoy the luxury of making rules that sound good but mainly affect *other people.* The common-law rules of contract were an easy target for them: Why stick with musty old legal principles when ingenious and compassionate thinkers could devise better, fairer ones?

A crucial question that occupies Professor Buckley in his introduction is how best to defend freedom of contract. He discusses three approaches: neo-formalism, which is based on the objection that the enemies of contract have politicized the law; Kantianism, the positing of a human right to freely enter into contracts; and consequentialism, the argument that freedom of contract leads to better outcomes than intervention. Buckley, like his contributors, believes that the most powerful and convincing arguments for freedom of contract are consequentialist, and perhaps he's right. While readers of *Ideas on Liberty* may see freedom of contract as a moral issue and regard it as unnecessary to demonstrate that interference has bad consequences, for many other people the case will not stick unless bolstered with consequentialist arguments.

There is too much in this volume to cover in a short review. It is like trying to tell a friend what's on the menu at a terrific restaurant. So here are some of the outstanding items. The redoubtable Richard Epstein leads off with "Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire." His essay is an extended rebuttal to four notorious critics of freedom of contract, arguing that they simply beat up on a few peripheral problems and then announced that they had killed off the case for contractual freedom. Epstein cuts their arguments to ribbons, exactly as anyone familiar with his legal and economic acuity would anticipate.

In his essay "In Defense of the Old Order," Timothy Muris argues that standard form contracts, far from being an assault on consumers by big business, enhance efficiency and give consumers benefits that would probably never be realized by most if they had to "bargain from scratch."

Essays by Professors Paul Rubin and Robert Cooter explore the boundary between tort and contract, suggesting that consumers would be better off if they were allowed to contract out of tort, leaving their remedy against a seller to the terms of the bargain and/or ordinary contractual remedies.

Zoning and land-use restrictions are another area where we have placed mistaken faith in government and would benefit from greater reliance on contract. Professor Robert Nelson's "Zoning by Private Contract" demonstrates that the putative goals of zoning could be realized through contract, without the coercion and favoritism with which zoning is so rife.

For the rest of the menu, visit the restaurant. □

George Leef is the director of the Pope Center for Higher Education Policy at the John Locke Foundation and book review editor of Ideas on Liberty.

After Liberalism: Mass Democracy in the Managerial State

by Paul Edward Gottfried

Princeton University Press • 1999 • 186 pages • $27.95

Reviewed by Joseph R. Stromberg

Americans have given up freedom and self-government for a mess of pottage. Modern "liberalism," argues political science professor Paul Gottfried in his insightful new book, rests on a "patricide" of the older liberalism. Whereas liberalism and democracy were once opposed concepts, they are now conflated, to the great detriment of the former.

Meanwhile, "democracy," which replaced liberal republicanism, gave way to irresponsible centralized bureaucracies. Thus "liberal democracy" is "less and less" liberal or democratic by any standards. The liberals' managerial state "succeeds by denying that it exercises power," Gottfried writes. Liberals aspire to run the economy and "socialize" children away from their parents' outworn values; they now wish to do so worldwide, as an outreach program of American imperialism. They are building a New Society that they, at least,

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expect to like better than the imperfect one they see around them.

Modern liberals—from J. S. Mill through Herbert Croly, Walter Weyl, Walter Lippmann, and John Dewey and his followers—justified the all-embracing state. Those social democrats stole their name from laissez-faire liberals, but talked a good game of democracy. As far back as Mill, they foresaw their ability, as a "new clerisy," to guide democracy along desired paths.

Gottfried argues that liberalism had to become an "armed doctrine," since "letting people go their own way will not suffice to make them open-minded or civic-spirited." Only constant intervention by trained administrators with a "universal faith in rationality" could avert the horrors attendant on actually leaving anyone, anywhere, alone.

Fascist and Bolshevik "social reconstruction" fascinated the "liberals." They settled for John Dewey's "experimental-scientific" approach, allegedly open-ended and rooted in "neutral" criticism of all "values." Natural scientists, who use this method in fields where it actually works, generally know when an experiment is over. In the New State it is the lab rats who are blamed for bad outcomes (if failure is even admitted) and ordered to ride the mass transit system of Progress and quit reading that pre-scientific Constitution.

By the 1940s liberals defined their outlook as a "fighting faith" opposed to fascism (communism having somewhat escaped their attention). "Value relativity" had been a useful cudgel against existing bourgeois, Christian values—"social acids" as one Deweyite put it—but liberalism itself was exempt from inquisition. Ongoing experiment gave ever-shifting "content" to an ever-new liberalism. The welfare state was means and end, since planning and economic redistribution were keys to a rational society. Freedom, Gottfried observes, was reduced to "what judges, public administrators, and journalists see fit to impose on other people." Bored with handing out pottage, welfare states "also tried to shape or reshape social relations to fit particular worldviews."

This social engineering and therapy is known, oddly, as "pluralism," although it is "plural" only in terms of organized factions, accredited victims (lately), and the administrators themselves. Gottfried quarrels with paleoconservatives who see modern liberalism as a "front" for New Class public meddlers. The truth, he says, is much worse: the administrators actually *believe* in their ideology and wish to impose it everywhere.

Fearing, after 1945, that "fascism" might come back, liberals turned education into an engine of social reconstruction. Egged on by that emigré Marxist charlatan Theodor Adorno, they fretted over the backward Americans' "mental health" and psychoanalyzed the "Radical Right" long distance. (This remains fashionable.) In the hands of journalists incapable of making distinctions, this attitude became a weapon of mass demonization.

"Multiculturalism" serves as another weapon in the liberal arsenal of *dirigiste* weaponry: "the present regime assigns 'ethnicity' and other generic categories to rearrangeable groups of citizens *as an exercise of power*," writes Gottfried. From the managers' standpoint, the "behavior modification" of Americans/Mankind "must go on indefinitely." This is Bolshevism Light, I guess. Stalin could never completely achieve a state composed of "new Soviet men" and the modern liberals will never completely achieve a state of ideally servile, collectively minded citizens, but to give up would put the entire project at risk. Liberal managerial meddling has no logical stopping point.

Gottfried surveys sundry American and European populist movements, concluding that little can be done to roll back, or even slow, the advancing Leviathan. Its pessimism aside, I strongly recommend this densely packed and reflective book (to which I have hardly done justice), which rests on Professor Gottfried's great erudition and close reading of the relevant European and American literature. □

Joseph Stromberg is the JoAnn B. Rothbard historian-in-residence at the Ludwig von Mises Institute.

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The End of Money and the Struggle for Financial Privacy

by Richard W. Rahn

Discovery Institute Press • 1999 • 219 pages • $25.00

Reviewed by Lawrence H. White

The first sentence of this provocative book reads: "Money—as we know it—is coming to an end." Money "as we know it" consists of cash (notes and coins) issued by government and checkable deposits issued by regulated banks. Paying with cash preserves your privacy, but is inconvenient for many transactions. Paying by check or debit card (or by credit card) compromises your privacy because the government can look at your bank records. Soon there will be a better alternative. Richard W. Rahn enthusiastically describes new "non-governmental digital money" technologies that combine the privacy of cash with the convenience of electronic deposit transfer. The central thesis of his book is that these new technologies will spread widely, and—rather like the spread of Gutenberg's technology of movable type 500 years ago—will have profoundly liberating implications.

In a few passages Rahn implausibly predicts that a sophisticated barter system, involving payment by the direct transfer of non-money financial assets, will come to supersede monetary exchange in the near future. But his central thesis does not really depend on the *end* of money, only on plausible changes in the methods of transferring it.

Rahn rightly insists that financial privacy is itself a valuable civil liberty, and enhances the enjoyment of other civil liberties. He predicts that the new encryption technologies for financial privacy will make laws against "money laundering" unenforceable, and taxes on financial capital uncollectable, except at extreme cost. A nation will prosper if and only if its government adapts to this new reality. A government that tries to repress the new technology—or tries to continue taxing, spending, and regulating as usual—will consign itself to the dustbin of history. Thus "the digital world will force change toward smaller, less intrusive, and less centralized government everywhere."

The book develops these arguments in a breezy style, offering a parade of colorful anecdotes rather than tight reasoning or systematic empirical evidence. The language is sometimes overly dramatic, and some of the anecdotes are beside the point. Particularly in Chapter 2, there are a number of regrettable misstatements of economic theory and history. These features will put off academic economists, but others will consider it more important that the book is enjoyable to read. Even academics will find that it describes the new payment and encryption technologies and analyzes banking regulations in accurate but accessible terms.

Rahn confronts head-on the two leading rationales for restrictions on financial privacy: tax collection and the war on drugs. He argues that "the digital revolution is about to cause the death of most taxes on capital." Because taxes on interest, dividends, and capital gains hamper growth, and because their collection requires governments to invade financial privacy, he urges that the governments simply abandon them. Rather than replace the revenue through other taxes, governments should shrink.

For some unstated reason, despite his emphasis on personal liberty, Rahn does not propose that the war on drugs should be abandoned. He instead argues only that it is not cost-effective to fight the drug trade through invasions of financial privacy. It is far easier to detect and interdict physical shipments of marijuana or cocaine than to detect or interdict payments for them, especially encrypted electronic payments. Adding the budgets of the federal enforcers to the estimated regulatory compliance costs of banks, and dividing by the number of convictions, he finds that the "total cost for each money laundering conviction . . . appears to be over a hundred million dollars." The people who have been caught and convicted have naturally been novices and small fry, not the sophisticated major operators.

In addition to the budgetary cost, Rahn emphasizes that a major drawback of enforc-

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ing laws against money-laundering is the loss of privacy and the associated threat to personal liberty for perfectly innocent citizens. He cautions us to consider governments as they are, not as wishful thinking would have them be: "there is little reason to believe that the same people that have had the responsibility for the oversight of the IRS and FBI will not abuse their knowledge of the most intimate details of your financial life." To illustrate the danger, he provides chilling anecdotes about the use of asset forfeiture statues. At bottom, his case for allowing financial privacy is like the case for allowing private gun ownership: it provides the average citizen with a defense against tyranny. Rahn courageously calls for the elimination of laws against money-laundering and the abolition of the Financial Crimes Enforcement Network of the U.S. Treasury.

As evidence that financial privacy does not breed lawlessness, Rahn points to Switzerland, a country that respects the privacy of bank accounts and yet has low crime. (He might have added that financial privacy does not prevent the Swiss government from collecting large tax revenues.) Switzerland also provides an example of depositor safety without the expense and bad incentives associated with government deposit insurance.

Despite some gaps in the argument, Rahn makes a fairly persuasive case for his central thesis. Greater mobility for financial assets through secure and private electronic funds transfer certainly will constrain governments. Inefficient and destabilizing bank regulations, such as reserve requirements and deposit insurance, will be harder to enforce when savers and borrowers can more easily and securely deal with offshore banks that offer better risk-adjusted rates. Important policy battles loom over whether governments will accept these new realities gracefully or try to fight them in ways that waste resources and invade financial privacy. □

Contributing editor Lawrence White is the Friedrich A. Hayek Professor of Economic History, University of Missouri—St. Louis.

Clearing the Air: The Real Story of the War on Air Pollution

by Indur M. Goklany

Cato Institute • 1999 • 189 pages • $19.95

Reviewed by Bruce Yandle

From the mid-1960s on into the early 1980s, it seemed obvious: Were it not for the benevolent protection provided by the federal government, America's smoke-filled cities and slime-ridden rivers would have become environmental wastelands. The caves were beckoning. Somehow simultaneously struck dumb, citizens by the millions happily traded the last smidgen of clean air for yet one more Pontiac GTO, another hula-hoop factory, or a chemical plant producing Agent Orange.

"Whose garden was this?" Tom Paxton's lovely song asked. How could people allow themselves to slip to the edge of environmental disaster? "Woe be unto us. Externalities overwhelm us; the markets have failed." This was the response from the freshly minted environmentalists and ever-apt politicians. The 1970 Clean Air Act then took possession of the filthy commons and cleared the air. Clean-water legislation gave similar protection to the poisoned rivers and shores. The race to the bottom ended. We now live happily ever after, forever in the debt of far-sighted Earth Day celebrants.

Thank heavens for federal command-and-control regulation!

In this powerfully documented book, Indur Goklany, formerly chief of the technical assessment division of the national Commission on Air Quality, does fatal damage to that story. Focusing on air pollution, he provides a totally different rendering. With meticulous attention to detail, Goklany carefully straps together disparate series of data on air emissions and air quality, examining each of the "criteria pollutants"—things determined harmful like sulfur dioxide, nitrogen oxides, and suspended particulates. He demonstrates that Americans were not struck environmentally dumb in the 1960s, 1950s, and before. No, it was just the reverse. When scientific

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knowledge and data showed environmental harm was in the offing, people in communities took positive action to protect the valuable biological envelope that sustains human life.

The timing of the "period of perception," which understandably varies for different pollutants, is a crucial part of his theory of environmental human action. Once costly health problems are perceived and income allows it, Goklany's "period of transition" arrives. This is the time when action is taken to limit further environmental degradation. Recognizing the complexities of the institutions that arose, Goklany's assessment examines data and trends that reach back as far as the nineteenth century. The data are compelling. Reductions in the concentration of each criteria pollutant begin well before the federal period.

Goklany provides almost exhaustive treatment of city ordinances, county regulations, and state legislation that were designed to clear the air. Unfortunately, he pays little attention to the significant role played by common law protection of environmental rights, which is the one fault I find with the book. Those bent on direct federal regulation generally neglect common law, and the book would have been more complete if Goklany had ventured into the field.

Clearing the Air supports the conclusion that when incomes are high enough, intelligent human beings will find ways to protect themselves from environmental harms, especially those of their own making. Rigorous and interesting discussion is given to the relationship between income and environmental quality, which when displayed graphically is called an environmental Kuznets curve (EKC). In recent years, EKCs, typically showing a period of environmental decay and then recovery, have become an artifact of environmental economics. But they have not been associated with a well-articulated theory of human action. Goklany's presentation showing how perception of a problem and transition generate EKCs remedies this shortcoming.

The book concludes with a carefully drawn and sad assessment of the federal regulatory experience. One part of the unpleasant outcome is related to the following facts: (1) Command-and-control regulation has been excessively costly, relative to performance standards or use of economic incentives. (2) Federal programs unduly limit state action in the name of controlling interstate pollution when much of the problem is intrastate. (3) There are profitable risk-reducing opportunities for increasing the level of control for some pollutants and decreasing the level for others. The second part of the unhappy result relates to the central finding of the book: Significant progress in controlling air pollution occurred in the absence of federal programs whenever problems were perceived and incomes allowed for action to be taken. If left to state, local, or private action, at least part of the cost of the federal saga could have been avoided and some of the benefits expanded.

Those looking for a polemic on the evils of big government and inefficiencies of federal programs will be disappointed with this book. It is not a polemic. It is a carefully researched report on the nation's experience with air pollution control and how the pre-federal and post-federal periods compare. Goklany's excellent treatise tells us that the pre-1970 decentralized approaches were working rather well. Markets were not failing. Externalities were not ubiquitous. In spite of this, political environmentalism was on the rise. Free-market environmentalism was forced to give ground. Now is the time to reverse the forces. □

Bruce Yandle is professor of economics emeritus at Clemson University and a FEE trustee.

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IDEAS ON LIBERTY
OCTOBER 2000

Greed Versus Compassion

What's the noblest of human motivations? Some might be tempted to answer: charity, love of one's neighbor, or, in modern, politically correct language, giving something back or feeling another's pain. In my book, these are indeed noble motivations, but they pale in comparison to a much more potent motivation for human action. For me the noblest of human motivations is greed. I don't mean theft, fraud, tricks, or misrepresentation. By greed I mean being only or mostly concerned with getting the most one can for oneself and not necessarily concerned about the welfare of others. Social consternation might cause one to cringe at the suggestion that greed might possibly be seen as a noble motivation. "Enlightened self-interest" might be a preferable term. I prefer greed since it is far more descriptive and less likely to be confused with other human motives.

That greed is the greatest of human motivations should be obvious to all; however, a few examples will make it more concrete. Texas cattle ranchers make enormous sacrifices to husband and insure the safety and well-being of their herds: running down stray cattle in the snow to care for and feed them, hiring veterinarians to safeguard their health, taking them to feed yards in time to fatten them up prior to selling them to slaughterhouses. The result of these sacrifices is that New Yorkers can enjoy having beef on their supermarket shelves. Idaho potato farmers arise early in the morning. They do backbreaking work in potato fields, with the sun beating down on them and the bugs maybe eating them. Similarly, the result of their sacrifices is that New Yorkers can also enjoy having potatoes on their supermarket shelves.

Why do Texas cattle ranchers and Idaho potato farmers make these sacrifices? Is it because they love New Yorkers? Only the most naïve would chalk their motivation up to one of concern for their fellow man in New York. The reason Texas cattle ranchers and Idaho potato farmers make those sacrifice is that they love themselves. They want more for themselves. In a word, they are greedy!

But that is the miracle of the market. Through serving the wants of one's fellow man, one acquires more for oneself. That is precisely what Adam Smith meant when he said, "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages." He added, "By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good." One might pause here for a moment and ask: How much beef and potatoes would New Yorkers enjoy if it all depended on human love, charity, and kindness? I'd be worried about New Yorkers.

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Greed promotes other wonderful outcomes. It's nice that present generations conserve on scarce resources in order to make those resources available to future generations. Owners of buildings make sacrifices of current consumption and spend resources on maintenance that extends the useful life of the building—long past their own lives. For example, the original owners of the Empire State Building are now dead; however, the sacrifices they made to maintain the building mean that today's generations can enjoy it. When timber companies harvest trees on their land, they spend the resources necessary to plant seedlings and insure that the forest will continue to produce trees long after the owners are dead.

Can one realistically produce an argument that present generations make sacrifices of current consumption to insure that goods such as buildings and lumber will be available for future generations because they actually care about future generations? After all there's no quid pro quo, no way for future generations to compensate them for the sacrifices made on their behalf. So why? Again, it's greed but with its facilitator, private property rights (rights residing in the owner to acquire, keep, use, and dispose of property as deemed fit so long as that use does not violate similar rights held by another).

The present value, or selling price, of say 10,000 acres of forest depends not only on how much lumber the forest will yield in the year 2000, but also in the years 2005, 2010, 2030, and so on. The forest's capacity to produce lumber in these out years is summarized in its present selling price. The longer the forest will produce trees, the greater will be its price. Therefore, the current owner of the forest has a vested financial interest in doing those things that protect the forest's productivity whether or not he will be alive in 2010 or 2030. In other words, his wealth is held hostage to his doing the socially responsible thing—conserving society's scarce resources. Thus one easily predicts that goods privately held will receive better care than goods communally held no matter what the good: cars, houses, land, and so forth. Owners tend to take better care of cars, houses, and land than renters or other non-owners.

We should hasten to add that for private property to have these beneficial effects it requires more than simply holding its title. The owner must have options. One could hold title to land but be restricted by government in its use. An example is when a person holds title to a 1,000-acre plot of forest land but the U.S. Fish and Wildlife Service decrees that some or all of it cannot be used, for fear of threatening an endangered species. Such a decree reduces the private use-value of the land and hence weakens incentives to care for it. Similarly, if there were high transfer taxes for land sales, it too would weaken incentives to care for the land. In fact, anything that weakens the owner's private property rights in the land weakens his incentives to do the socially responsible thing—conserve society's scarce resources.

While human motivations such as charity, love, or concern for others are important and salutary, they are nowhere nearly as important as people's desire to have more for themselves. We all know that, but we pretend it is not so. That unwillingness to acknowledge personal greed as vital to human welfare, and instead view it with disapproval, makes us easy prey to charlatans and quacks who'd take away our liberties in the name of combating greed. □

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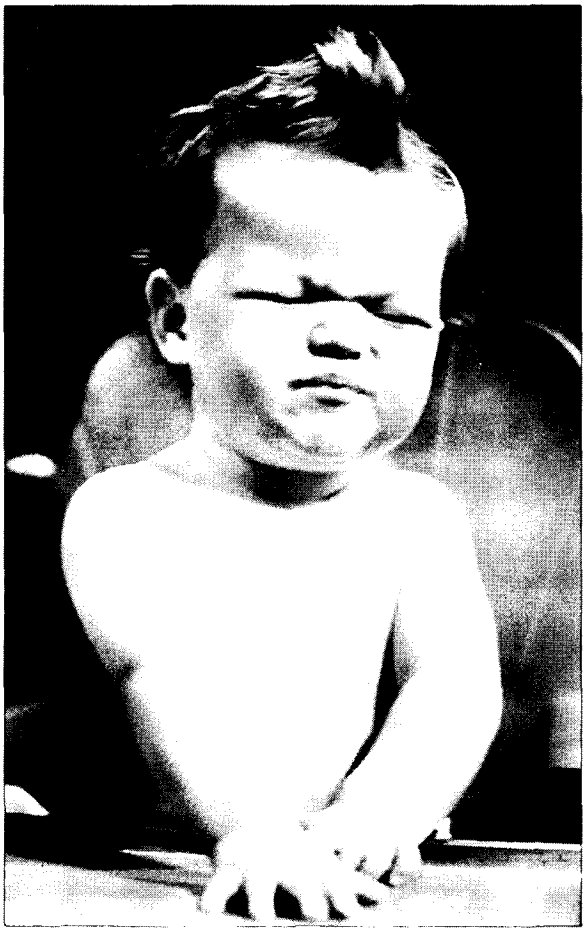

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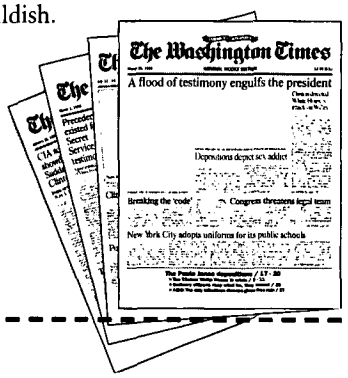
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"I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations."

—JAMES MADISON (1751-1836),
speech, Virginia Convention, June 1788

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